THE LAW OF

BANKERS' CHEQUES.

A

PRACTICAL TREATISE

ON

THE LAW

OF

BANKERS' CHEQUES,

Letters of Credit, and Drafts,

COMPRISING

THE STATUTES AND CASES RELATIVE THERETO,

WITH OBSERVATIONS.

BY GEORGE JOHN SHAW.

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PREFACE

TO THE PRESENT EDITION.

The First Edition of this work was published more than twenty years since, and it has long been out of print.

A favourable time seems to have arrived for offering a New Edition to the public. I have tried to make the work useful to Bankers in the performance of their daily duties; and although I am aware it is not by any means perfect, yet I believe, so far as it goes, those who are interested in the questions it discusses will find it may be relied upon.

GEORGE JOHN SHAW.

8, Furnival's Inn,
February, 1871.

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THE LAW OF CHEQUES.

CHAPTER I.

ON THE FORM AND REQUISITES OF CHEQUES.

1. *Definition of a cheque.*
2. *Place where cheque issued.*
3. *Time when cheque issued.*
4. *Name and address of banker upon whom cheque drawn.*
5. *Person in whose favour cheque drawn.*
6. *The words "or bearer," "or order."*
7. *The sum payable.*
8. *Of the time when the cheque is payable.*
9. *The drawer's signature.*
10. *The stamp.*

1*st. Definition of a cheque.*

A CHEQUE is an unaccepted bill of exchange drawn upon a banker by his customer, and generally, but not always, against funds lodged with the banker. From this definition it follows that although a cheque is a bill of exchange, yet it has peculiar characteristics, and differs in some respects from ordinary bills of exchange. In the case of *Mullick* v. *Radakissen*, heard in the Privy Council in 1854, the court said:—"A cheque is a peculiar sort of instrument in many respects resembling a bill of exchange, but in some entirely different.

A cheque does not require acceptance. In the ordinary course it is never accepted. It is not intended for circulation. It is given for immediate payment. It is not entitled to days of grace, and though it is strictly speaking an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet in the ordinary understanding of persons it is not so considered. It is more like the appropriation of what is treated as ready money in the hands of the banker; and in giving the order to appropriate to the creditor, the person giving the cheque must be considered as the person primarily liable to pay to the drawee his debt at a particular place."

The requisites prescribed by law and custom with regard to the form of a cheque, are few and simple, but they are highly important. In general, bankers supply printed cheque-books to their customers, which contain blank forms to be filled up. The common form runs as follows:—

"London, 1st January, 1870.

"West London Commercial Bank, Limited, 34, Sloane Square,—Pay [Mr. Wood] or bearer fifty pounds.

"£50. "[EDWARD BRIGHT.]"

2*nd* *The place where the cheque is issued.*

It is not now necessary, although it is usual, to state on the face of the cheque where it is or is supposed to be issued. Bankers, generally, print

at the head of the form the name of the town where they carry on business, and the drawer fills in the date of the cheque in the blank space left for that purpose. This practice gave rise to many questions under the old law. See the following cases:—*R.* v. *Pooley*. *R.* v. *Perry*. *Waters* v. *Brogden*. *Strickland* v. *Mansfield*. *Bopart* v. *Hicks*. *Bond* v. *Warden*. Collected in the last edition of this work. They need not now be further alluded to.

3rd. Of the time when the cheque is issued.

The cheque must bear date on or before the day on which it is issued. This was required under the old law, and is required now by the Stamp Act (33 & 34 Vict., c. 97, s. 48), which declares that the term "bill of exchange" includes "cheque," and afterwards, in the schedule, imposes a duty of one penny on a bill of exchange payable on demand, and other rates of duty on any other kind of bill of exchange. If a cheque bear date on a day after it is issued, it will not be payable on demand, but on the day it is dated.

Thus in *Allen* v. *Keeres* (1 East's Reports, 435), which was an action brought against a drawer of a bill of exchange, payable to bearer, for £20, bearing date the 18th day of the month, it appeared in evidence before Lord Kenyon, at the trial at Guildhall, that the bill, which was a common banker's cheque, was, in fact, drawn on the 14th, though bearing date four days after-

wards, and was thus post-dated, because it was not intended that it should be presented for payment till the 18th, whereupon it was objected, that in effect this was a bill payable four days after date, and therefore ought to have been upon a stamp, otherwise the Stamp Act would be entirely evaded by drawing bills of the date on which they were intended to be payable. A rule for entering a nonsuit was made absolute.

In *Whitwell* v. *Bennett* (3 Bosanquet and Puller's Reports, 559), the cheque was post-dated, and it was objected for the defendant, that the draft, being post-dated, was void; and on the case coming before the Court of Queen's Bench, the counsel interested in maintaining the validity of the cheque, admitted that, after the case of *Allen* v. *Keeves*, it was impossible to contend that the cheque was valid.

Serle v. *Norton* (9 Meeson and Welsby, 309), was an action on a banker's cheque, dated March 19th, 1841, made by the defendant, which the plaintiff received from Wright (to whom he gave value for it), some days before the date which it bore. It was contended for the plaintiff that the cheque, though post-dated, was evidence to support a count in the declaration for money paid. The learned Judge thought otherwise, and directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for him on the second count for the amount of the cheque. Counsel having moved accordingly—

Lord *Abinger*, C.B., said:—"I think there is no ground for a rule. The case cited rests on a different principle. Suppose the case of a bond which was originally good, but was afterwards destroyed or altered, the party could not declare upon it, because he had made it void, as a security, by his consent: but it would still be evidence to show the nature of the transaction. Here the cheque could not be read at all; it was altogether void."

Alderson, B.—"This was a paper altogether inadmissible as evidence."

Gurney, B., concurred.

In the case of *Regina* v. *Taylor* (1 Carrington and Kirwan's Reports, 213), it was held that a post-dated cheque came within the description of an order for the payment of money.

These cases were all decided before the introduction of the penny stamp. In *Whistler* v. *Forster* (32 Law J. (C.P.) 161), it was decided that a post-dated cheque payable to *order* on demand was not void, although a cheque payable to bearer on demand might be, one of the judges remarking, "Whether the drawer is subject to a penalty or to be sued for the difference of stamp duty, is a question upon which it is unnecessary to offer an opinion." In *Emanuel* v. *Robarts and Others* (17 Law Times 646), a post-dated cheque, payable to order, was refused payment by the bankers the day before it was dated and marked "post-dated," and again refused payment by them on the day

on which it was dated, the Court held they were justified and said:—

"The finding of the County Court Judge is, that in the city of London there exists a custom amongst bankers not to pay cheques which are post-dated: and as, when such a cheque is presented, they give their reason for nonpayment by marking it as post-dated, so when the cheque afterwards comes again with the notification upon it that it was post-dated, they then have notice of the original defect and refuse payment. Taking the contract to be that cheques which are post-dated will not be honoured, it is clear that the contract has not been broken by the defendant, and I am of opinion that the contract itself is not unreasonable."

It seems from this case that, independent of the Stamp Act, there is a valid custom amongst bankers not to pay a cheque which is post-dated, and this is therefore an additional reason against post-dating.

We shall give the clauses of the new Stamp Act on which we base our conclusions when we treat of the subject of the stamp.

4th. The name and address of the banker upon whom the cheque is drawn.

Under the old Stamp laws it was necessary that an unstamped cheque should be drawn upon a banker; *Castleman* v. *Ray* (2 Bosanquet and

Puller's Reports, 383), but under the new Stamp Act there is no difference in this respect between cheques and any other bills of exchange payable to bearer or order on demand. It may however be a question, whether it is not still necessary that cheques for less than 20*s.* should be drawn upon a banker. See 23 & 24 Vict., c. 111, s. 19. A cheque may be drawn upon a bank where the drawer has no account where it is intended to operate as a security for a loan from the banker to the drawer. *Cobb* v. *Snowden* (13 Law Times, 232).

5th. As to the person in whose favour the cheque is drawn.

The person in whose favour the cheque is drawn is called the payee; but it does not appear to be necessary that in a cheque payable to bearer there should be any payee, and in practice such a cheque is often made payable to some particular account, or to a number or a letter. In case the cheque is payable to order, there must be a payee who must also indorse, but we apprehend that the lawful holder of a blank cheque payable to order, may fill in his own name as payee.

6th. The words "or bearer," "or order."

These words which were formerly necessary (*Rex* v. *Yates*, 1 Ryan & M., C.C., 170), are not required any longer, and a cheque may now be payable to a particular person only. 33 & 34 Vict., c. 97.

When the cheque contains the words "or order," the banker is not responsible if he should pay a forged indorsement. See 16 & 17 Vict., c. 59, s. 19, which is still in force although the greater part of that Act has been repealed; and see the subsequent chapter on the "The Banker" upon whom a cheque is drawn. A cheque although payable to A. B. "or bearer" may be indorsed by A. B., and in the event of its being dishonoured the holder may sue A. B. as indorser. *Keene* v. *Beard*, 36 *Law Times*, 240.

7th. The sum payable.

The 23 & 24 Vict., c. 111, s. 19, provides that notwithstanding anything in any Act of Parliament contained to the contrary, it shall be lawful for any person to draw upon his banker who shall *bonâ fide* hold money to or for his use any draft or order for the payment to the bearer or to order on demand of any sum of money less than 20*s*.

8th. Of the time when the cheque is payable.

The words "on demand" are seldom inserted in practice in the cheque. The legal effect of an instrument of this kind, in which no period of payment is named, is that it is payable on demand, and therefore it is unnecessary so to express it. In America where there are no stamp laws, cheques are post-dated, or made payable at a certain time after date, and are still considered to be governed by the rules relating to cheques, and

not by those relating to bills of exchange, and therefore not to require days of grace or notice of dishonour. *Mohawk Bank* v. *Rudwick* (10 Windell's Reports. *Re Brown*, 2 Storey, 502).

9th. The drawer's signature.

This is a material part of the cheque, but it is unnecessary to consider it at any length. The drawer ought to sign his name in such a manner as to avoid giving rise to any difficulty on that account.

CHAPTER II.

OF THE DRAWER OF A CHEQUE.

PART I.

THE GENERAL RIGHTS AND LIABILITIES OF THE DRAWER OF A CHEQUE.

1. *Mode of drawing cheques.*
2. *Having effects at bankers.*
3. *Stopping payment of cheque.*
4. *Liability on a cheque.*
5. *Delay in presenting a cheque.*
6. *Lost or stolen cheques.*
7. *Lost cheque.*
8. *Cheque destroyed.*
9. *Fraudulently inducing a banker to honor cheque.*

1. *On the mode of drawing or filling up cheques.*

THE first duty of the drawer of a cheque "is to draw it in a business-like manner." Thus, the drawer of a cheque ought to fill it up so carefully as to prevent a fraudulent alteration in the amount. In *Whitmore* v. *Wilks* (see Moody and Malkin's Report, 216), this subject was discussed, involving an important point to bankers. The defendant, Wilks, was clerk to the trustees for lighting and paving Saint Luke's, and had not attended personally to the execution of his office, but employed a clerk named Milne as his deputy, who was guilty

of malversation; and the trustees brought the present action against Wilks to recover the amount they had lost by Milne's fraud. The following are the facts:—Several cheques had been paid by the trustees' bankers, which, when paid, purported to be for larger sums than those really due from them. These cheques were made out by Milne. It did not distinctly appear whether they were originally made out by him for the larger sums actually paid, or whether they were made out for the true sums, but in such a manner that they might easily be altered afterwards by the insertion of other words: for instance, a cheque drawn for fifty pounds by the insertion of "one hundred" before the fifty, and so in other cases. It rather appeared, however, that this latter was the case; that the cheques, the body of which was engraved, were presented to the trustees for signature with the correct sums inserted, but with blank spaces left before the sums, and then that the trustees merely signed the cheque without drawing their pens over the blank spaces, or in any way preventing the subsequent insertion of other words there; and that Milne afterwards filled up the blanks so as to increase the sum apparently ordered to be paid, and the bankers actually paid such larger sum. Lord *Tenterden*, who tried the case, said, "The defendant, when he employs a clerk to transact the business of the office for him, has a right to suppose the trustees will do their duty; there are two ways in which the loss may have happened. Milne may

have originally made out the cheques for the sums finally appearing upon them; and then, independently of any difficulty in charging Wilks for such an act, the trustees are in fault for having signed cheques for demands which they knew, or ought to have known, not to be due from them. If this was not the case, the cheques must have been brought to them for the right amount, but in such a form, and with blank spaces so left, that words might easily be interpolated into them. In this case the trustees, as men of business, ought, when they signed, to have filled up the blanks in some manner so as to prevent this danger. This, if the cheques were originally right, they have not done; and it is in consequence that the alteration was feasible. On either suppositions, therefore, the loss is occasioned by their own fault; and I think they cannot charge the defendant with the consequences." These observations are remarkably clear and decisive, and we earnestly recommend them to the attention of men of business.

A similar point arose in the case of *Young* v. *Grote* (4 Bingham's Reports, 253), in which a customer endeavoured to recover from his banker the amount of his cheque which had been paid by the banker after it had been fraudulently altered. We will take our statement of this decision from "*Bayley on Bills*," in order that we may correct a strange omission which is there made in the abridgment of the case:—"Young left a blank cheque with his wife, duly signed by him, that she might fill in

sum and date according to what she might want. She wanted £50. 2*s*. 3*d*. for wages; and, by her orders, Worcester, one of Young's clerks, filled it up accordingly, and showed it her, and she directed him to get it cashed by defendant's (her husband's) bankers. In filling up the cheque, Worcester wrote the word fifty with a small initial, and left sufficient space on the left side for introducing any additional word, and he wrote the figures so as to leave space on the left side for any additional figure; and, before presenting it, Worcester put 'three hundred and' before the word fifty, and 3 before the 5, so as to make it a cheque for £350. 2*s*. 3*d*. Defendants paid it as such. Plaintiff would not allow that payment, and sued for his balance. The cause was referred, and the arbitrator found that there was gross negligence in suffering Worcester to have possession of the draft, drawn as that draft was, in his hand-writing, and with such spaces not filled up, so as to exclude all chance of detecting the forgery; and that, as plaintiff, or those with whom he was identified, by such negligence were the cause of the defendants paying the cheque according to its altered state, plaintiff ought to bear the loss. A *rule nisi* was obtained that the award should be corrected, and the defendants pay the money drawn." Here the abridgment of the case ends. The result is entirely omitted; for it is not stated whether the *rule nisi* was discharged or made absolute; and, consequently, it is left in doubt whether the Court

considered that the banker or the customer should bear the loss. On referring to the case itself, it will be found that the Court of Common Pleas agreed with the arbitrator, and held that the loss must fall upon the customer, as he had been guilty of negligence in drawing a blank cheque, and in employing a dishonest clerk, whilst no fault could be imputed to the bankers. The same principle was acted upon in the case of *Rex* v. *Wright* (1 Lewin's Crown Cases, 135). There the question was, whether if a man be in the habit of signing blank cheques, and one of them be fraudulently filled up by another party, and the banker pays it, is the banker liable to refund to the party whose cheque it purports to be? and Mr. Justice Bayley was clearly of opinion that he would not be liable.

The decision in the case of *Simmons* v. *Taylor*, 4 C. B. 463, that a banker was not responsible for paying a crossed cheque to the holder who was not a banker, where the crossing had been erased, and which excited much comment at the time, may also be supported on the principle that the person who crossed the cheque must have done so in a negligent manner.

2. *On having effects at the bankers to meet cheques.*

The drawer of a cheque should take care that there are sufficient effects at his bankers to pay the cheque, otherwise he will be liable to an action upon the cheque, without any notice of the refusal on the part of the bankers.

In an action against the makers of a promissory note, "payable at Were, Bruce and Co.'s," being presented there for payment when due, the answer was, "not sufficient effects." The only point made for the defendants was, that they were entitled to notice of its dishonour. The place where it was made payable being, according to recent decisions, a material part of the instrument, it exactly resembled a bill of exchange, the bankers standing in the place of the drawers. Had it been a bill of exchange, the defendants were clearly entitled to notice, for they had some effects in the hands of Were, Bruce and Co., and there was the same reason for their receiving notice, although the form of the instrument was different. They might suppose that the bankers would pay the note; and they ought, as early as possible, to have had the information that it would be necessary for them to provide for it themselves, and that their balance at the banking-house remained unappropriated. The necessity of notice to the maker of a promissory note of its dishonour, results from the determination that his liability does not attach till payment has been demanded at the place where it is expressed to be payable. But Lord Ellenborough clearly held that notice was unnecessary, and the plaintiff had a verdict. *Pearse* v. *Pemberthy* (3 Campbell, 261). See also *Deverell* v. *Whitmarsh* (5 Jurist, 963). *Kemble* v. *Mills*, 1 M. and G., 757. *Carter* v. *Flower*, 16 L. J. Ex., 199.

The civil and criminal consequences of drawing

a cheque payable at a bankers with whom the drawer keeps no account, and which he knows will not be paid, will be discussed in a subsequent part of this work.

3. *On stopping payment of a cheque when it has been given upon a condition which has not been performed.*

In an action on a banker's cheque drawn by the defendants for the sum of £532, it appeared that a house in Westphalia having received a sum of money on account of the plaintiff, directed the defendants who were their correspondents in London, to pay it to him, but said they could not allow him interest upon it, as they had none themselves. This being communicated to the plaintiff, he at first insisted on interest, but finally agreed, on having a cheque for the principal, to give a receipt in full. He accordingly wrote such a receipt, and received the cheque in question in exchange. Having got it into his hands, he said he should prosecute the house abroad for interest, before the Chamber of Commerce at Paris. The defendant thereupon ordered payment of the cheque to be stopped.

Lord Ellenborough :—"If I give a draft upon a condition, and I find the condition is to be eluded, I may stop the payment. This was a conditional delivery of the draft. When it was delivered, all still remained *in fieri*. The defendants, on dis-

covering the plaintiff's intentions, were fully justified in resisting the demand. The draft in his hands had become a piece of waste paper. *Weinholt* v. *Spitta and others* (3 Campbell, 376).

Trover for goods, bills of exchange, &c. Plea, general issue.—Plaintiffs were the assignees of W. Barthrop the elder, and W. Barthrop the younger, wool-merchants. On the 15th of June, 1821, the bankrupts were indebted to Ellison, Moore and Co., bankers in Lincoln, in the sum of £1,300, who refused to give them any further credit until that balance was liquidated. In order to effect this, application was made to the defendant who agreed to advance £200 for that purpose, and accordingly drew a cheque upon his banker for that sum, and delivered it to W. Barthrop the son, on the 18th of June. On the 20th of June, W. Barthrop, the father, committed an act of bankruptcy, and on the evening of the same day received a letter from his son containing the cheque in question, together with several bills of exchange which the son had collected in payment of outstanding debts. W. Barthrop, the father, did not open this letter, but carried it back the same night to his son's house at Bradford; and, on the following day, the cheque, all the bills, and goods to a considerable amount were delivered over to the defendant in payment of a debt due to him. A short time afterwards W. Barthrop, the younger, committed an act of bankruptcy, and a joint commission was issued against him and his father, under

which the plaintiff was chosen sole assignee. Under these circumstances, the learned judge thought that the plaintiff was not entitled to recover the amount of the cheque, and the jury accordingly found a verdict for the plaintiff for £1,016, being the value of the remainder of the property delivered over to the defendant. And afterwards

Vaughan, Serjeant, moved to add £200 to the damages found, and contended that the defendant intended to give the bankrupts a general control over the cheque: the restoration of it to the drawer was therefore a fraudulent preference, and entitled the plaintiff to recover the amount in this action.

But the Court said—"This was a draft upon the defendant's banker, and not money; and the evidence shows that it was given for the specific purpose of being paid into the bank of Ellison, Moore and Co., in reduction of the balance due to them from the bankrupts. Now, if a cheque be placed for a specific purpose in the hands of a person who gives no value for it, and that person becomes bankrupt before he has used the cheque, if the drawer gives his banker orders not to pay the money, the assignees of the bankrupts cannot maintain an action to recover it. The bankrupt certainly could not do so, and his assignees must, in this respect, stand in the same situation. The direction of the learned judge was therefore right, and the damages ought not to be increased. *Moore* v. *Barthrop* (2 Dowling and Ryland, 25).

4. *Liability on a cheque given on a consideration which fails.*

The drawer of a cheque will not be liable if the cheque is given for a consideration which subsequently fails, unless the holder has taken it without any knowledge of that circumstance, and has also given value for it. The case of *Mills* v. *Oddy* (reported in 1 Gale, 92), will illustrate the first part of this position. The following extracts from the judgment of the Court, which was delivered by Mr. *Baron Parke*, contains the facts of that case. "It was an action against the defendant as drawer of a cheque for £39. 18*s*. on the Bank of England, and the plea was, that there was no consideration or value for drawing the said cheque; the replication was, that there was, a good consideration. On the trial before me at Guildhall, it appeared that the cheque was given by the defendant for the payment of a deposit on a sale by auction of certain leasehold property by the plaintiff as auctioneer to the defendant, and which property was described in the particulars of sale by which the defendant was to be bound. One of the conditions was, that no error or mistake should avoid the sale: the jury found that there was a misdescription, and also that it was wilful, and therefore the defendant had a right, notwithstanding the condition, to repudiate the contract altogether, which he did; and having given the bank orders to dishonor his cheque, payment was

refused. In the present case, the cheque was given in lieu of money, as a deposit on a sale; the consideration for giving it by the defendant was, that the plaintiff contracted to sell leasehold property of a certain description, which property, in fact, he had not to sell. The defendant, therefore, had a right to rescind the contract, and he would be entitled to recover back the deposit if he had paid it in cash; and he might resist the payment of the cheque on the ground that the contract having been done away by fraud, there was in truth no consideration."

See also *Lewis* v. *Cosgrave* (2 Taunton). The latter part of the position flows naturally from the similar rule with regard to bills and notes, and which is thus laid down in Bayley's work, p. 499. "The want of consideration *in toto*, or in part, cannot be insisted upon if the plaintiff, or any intermediate party between him and the defendant, took the bill or note *bonâ fide*, and upon a valid consideration."

5. *Effect of delay in presenting a cheque on the liability of the drawer.*

The drawer of a cheque is not discharged by any delay in presenting it short of the six years fixed by the statute of limitations, unless he has been no party to the delay, and has sustained loss thereby.

In the following case an action was brought by the plaintiff upon a cheque dated 17th February,

1796, drawn by the defendants upon Messrs. Down, Thornton, & Co., payable to bearer, for £2,444. 14*s*., which was refused payment by the drawees. It appeared that the house of Muilman and Nantes having agreed to lend the defendants their acceptances, had, accordingly, on the 15th November, 1796, accepted a bill of exchange of that date, drawn on them by the defendants for £2,444. 14*s*. at three months' date, which would become due on the 18th of February, 1797, which bill the defendants negotiated; and, as a counter security for the purpose of enabling Muilman and Nantes to take up their acceptances when due, the defendants gave them the following cheque upon their bankers, upon which the present action was founded, and which bore date nine months before it was drawn.

"Bartholomew Lane, London,
"17th February, 1796.

"Messrs. Down, Thornton, Free and Cornwall, pay Mr. Dobson, or Bearer, £2,444 15*s*.

"Sterling, Hunters & Co."

Muilman died, and Nantes, his surviving partner, became a bankrupt before the day when their acceptance became due; in consequence of which, the defendants were obliged to take up their bill drawn upon that house. In the meantime, on the 20th January, 1797, before the death of Muilman, or the bankruptcy of Nantes, they had passed the defendants' draft on Down and Co. to the plaintiffs

for a valuable consideration, namely, a precedent debt, the plaintiffs being at that time ignorant of the transaction between the defendants and Muilman and Nantes. The draft, when tendered at Down and Co's., was refused payment; and in subsequent conversation on the same day between an agent for the plaintiffs and one of the defendants, the latter said that it ought not to have been presented for payment, as they had paid it on a bill of Muilman and Nantes, meaning the acceptance above mentioned, but they should wish to pay this draft provided they could prove the bill under the commission against Nantes; and that he had sent, the night before, to the plaintiffs to desire a meeting in order to accommodate this business, and was sorry they had not met, as an accommodation might have taken place; and if the plaintiffs would prove under the estate of Nantes, they, the defendants, would endevour to provide for the payment of this draft. The defendants afterwards refused to pay the draft. It was contended at the trial, on the part of the defendants, that this was like the common case where a person takes a bill of exchange from an indorser after it has become due, in which case the indorser must stand in the same situation, and subject to the same equities as the person from whom he received it. And that, as in this case, Muilman and Nantes could not have recovered against the defendants on this draft, because the consideration as between them had failed by the nonpayment of

their acceptance, so neither could the plaintiff recover, who had taken the draft from Muilman and Nantes nine months after it was due, which circumstance alone should have induced them, in common prudence, to have made inquiry concerning the occasion of the draft being so long outstanding. *Lord Kenyon*, however, was of opinion, that it was a question for the jury to decide, whether the plaintiffs had received this draft *bonâ fide*, and without knowledge of the circumstances under which Muilman and Nantes held it; and if so, he thought, though not without some doubt, that the mere circumstance of its being so long outstanding at the time, was not sufficient to exonerate the defendants from their liability under the circumstances of this case, whereupon the jury found a verdict for the plaintiffs.

On a rule for a new trial, *Lord Kenyon* said—"At the time of this trial, I thought there was a difference between bankers' cheques and bills of exchange, and that the rule adopted with regard to the latter did not apply to the former; but, on further consideration, I do not think that that distinction is well founded. But the defendant's position that bankers' cheques are not considered by merchants as negotiable instruments, appears most extraordinary; for this very instrument on which the action is brought shows the contrary. It was made payable to Dobson or bearer, and instead of being given to Dobson, to whom it was

payable in the first instance, it was immediately delivered to those under whom the plaintiffs claim.

"Let us consider the particular circumstances of this case, on which alone my opinion proceeds. The proposition on which the defendants rely is, not that the plaintiffs have not given a valuable consideration for the cheque; nor that the bankers on whom the cheque is drawn had not assets in their hands to pay it; nor that the plaintiffs, when they took it, conceived any doubt but that the defendants would pay it: but that they (the defendants) on the 15th November, 1796, sent this cheque into the world with its own death-wound about it, and that it was not negotiable at all, even when it was issued by them; and after they have perplexed the world with the confusion of dates occasioned by their own act, they have the audacity to say, in a court of justice, that because payment was not demanded by the plaintiffs nine months before it was even issued by themselves, payment of the bill cannot be enforced at all; but this is too gross a fraud to be practised on the plaintiffs, who are *bonâ fide* holders of the bill. The rule established in *Brown* v. *Davis*, and in the other case there referred to, was framed to exclude fraud, and it professed to be founded on grounds of justice; whereas here the demand is founded in justice, and all the difficulty is occasioned by the defendants themselves, who issued the bill with the objection, of which they now wish to take advantage, appearing on the face of it; but I am clearly of opinion,

on principles of law as well as justice, that it is not competent for them to take this objection," *Boehm and others* v. *Sterling and others* (7 Term Reports, 423; 2 Espinasse's Reports, 574 S.C). To the same effect as this are the cases of *Serle* v. *Norton*, *Robinson* v. *Hawksford*, and *Laws* v. *Rand*, which are cited in the chapter relating to the rights and liabilities of the holder. In *Serrell* v. *Derbyshire and Staffordshire Railway Company* (15 Law Times, 254, 19 L.J.C.P. 371), *Maule*, *J.* said—"But as to the question of the cheque being overdue, it having been shown generally that it originated in fraud, I think it would be thrown upon the plaintiff to show at what time he took it."

But when any loss has arisen by the delay—as for instance, if the banker has failed with effects of the drawer—then the latter will be discharged, unless the holder has used due diligence in presenting the cheque, which is generally allowed to be the day after the receipt of the cheque; but this point will be fully considered in the chapter relating to the holder of a cheque.

6. *Cheques which have been lost or stolen, and are afterwards held by bonâ fide parties.*

The drawer is liable to any *bonâ fide* holder of a cheque, although the cheque was stolen and passed away by the thief, or fraudulently obtained from the drawer and then passed away. Thus, in *Grant* v. *Vaughan*, reported in 3 Burrows, 1516,

and 1 Blackstone, 485. The facts were as follows: The defendant, a merchant in London, gave a cash note upon his banker to one Bicknell, a husband of a ship of his, which note was dated "London, 22nd of October, 1763," and directed to Sir Charles Asgill, who was Vaughan's banker, and was worded thus:—"Pay to ship *Fortune*, or bearer," so much. Bicknell, by some accident, lost this note. The person who found it, or who, at least, was in possession of it (however he might obtain that possession), came, four days after the note was payable in London, to the shop of Grant, the plaintiff, who was a tradesman at Portsmouth, and bought five pounds worth of tea of him, and gave him this note in payment, desiring to have the change out of it. Grant, the plaintiff, went out to make enquiry who this Vaughan might be, and upon being informed that he was a very good man, and that it was his hand-writing, he readily gave the change out of the note, retaining the price of the tea. Vaughan, upon being apprised that Bicknell had lost the note, sent notice to Sir Charles Asgill "not to pay it." Whereupon Grant being refused payment, brought his action, and the Court of King's Bench determined that the plaintiff was entitled to recover upon the count for money had and received.

It will be observed that the document in the foregoing case was clearly a cheque, and that the holder took it four days after it was payable, and yet he was allowed to recover the amount of the

drawer. But in subsequent cases great stress has been laid upon the circumstance of the holder's taking the cheque a few days after date, as showing, of itself, culpable negligence; and we will proceed to examine these cases briefly, and then refer more fully to the modern authorities, which appear to bring back the law to the position in which it originally stood.

In *Down* v. *Halling* and others (6 Dowling and Ryland's Reports, 455), it appeared at the trial, before Chief Justice Abbott, that on the 16th November, 1824, the plaintiff received a cheque from his brother for £50, drawn on the same day, upon the banking firm of Sir Peter Pole, Thornton and Co., payable to the plaintiff or bearer. In the afternoon of the 22nd November, between three and four o'clock, a female, of apparent respectability, came to the shop of the defendants, who were linendrapers in Cockspur-street, and purchased goods to the amount of £6. 10s., and tendered in payment the cheque in question. The shopman who served her took the cheque to one of the defendants for the change. Questions were then asked of the woman, and she said she was upper servant in a gentleman's family. She was desired to write her name and address on the cheque, but she said she was an indifferent writer, and requested the shopman to write it for her, which he did at her dictation. Her unembarrassed behaviour and apparent respectability disarmed all suspicion. The change was immediately given

to her, and she carried the goods away, after declining to have them sent to her residence. The defendants were too busy to send the cheque for payment at the banking-house that afternoon; but on the following morning, between nine and ten o'clock, it was presented and paid without objection. On the 25th November, the plaintiff, for the first time, gave notice at the banking-house not to pay the cheque when it should be presented. An enquiry was then instituted by the bankers, how the defendants became possessed of the cheque, and they gave the account of it above mentioned. Search was made after the woman, but no such person was to be found by the name and address which she had given. No proof whatever was given of the manner in which the cheque had passed out of the plaintiff's hands. The Lord Cheif Justice Abbott left it as a question of fact to the jury, whether the defendants had not been guilty of negligence; for if the jury should be of opinion that the cheque, presented as it was so many days after it was drawn, was tendered to the defendants under such circumstances as ought reasonably to excite suspicion in the minds of persons conversant with business, and induce an inquiry into the right of the party who presented it, then the plaintiff would be entitled to a verdict. The jury found for the plaintiff. An application was afterwards made for a new trial; first, on the ground that the plaintiff had no title to recover; and second, on the ground that the jury had been

misdirected. But the Court supported the ruling of the Lord Chief Justice. It will appear from decisions which will be subsequently referred to, that this case, and some other similar cases, are not now law. So far as the date is concerned, *Down* v. *Halling* is clearly opposed to *Boehm* v. *Sterling;* and the negligence, if any, of the defendants, and which influenced the Court, was, according to the last mentioned decisions, insufficient to charge the defendants with the loss. We have referred to it at length, that it might not be supposed it was overlooked, and because it is still sometimes quoted as an authority.

The next case to which we shall refer is *Rothschild* v. *Corney and others* (9 Barnewall and Cresswell, 388). Where *Lord Tenterden* said—"It cannot be laid down as a matter of law, that a party taking a cheque after any fixed time from its date, does so at his peril; and, therefore, the mere fact of the defendants having taken the cheques six days after they bore date, from a person who had not given value for them, did not entitle the plaintiff to a verdict. It was, indeed a circumstance to be taken into consideration by the jury, in determining whether the defendants had taken the cheques under circumstances which ought to have excited the suspicions of prudent men. If the case were sent to a new trial, the same question must be presented to the jury; and, as we cannot say that their former verdict was wrong, I think that we ought not to disturb it."

And Mr. *J. Littledale* said—"It has been urged as matter of law, that a party taking a cheque overdue, has it with the same title, and no other, as the person from whom he receives it. But, although the rule of law certainly is so with respect to bills of exchange and promissory notes, I think it cannot be applied to cheques."

But the cases which are now considered to contain the modern law upon this subject, are the following: and although they happen to relate to bills of exchange and promissory notes, yet they are equally applicable to cheques, which, for this purpose, may be regarded as bills of exchange which are not due with this qualification, that they do not bear date an unreasonably long time before they are taken.

The first is that of *Crook* v. *Jadis* (5 Barnewall and Adolphus, 909; and 3 Neville and Manning, 257). This was an action brought by the plaintiff, as indorsee, against the defendant as drawer of a bill of exchange, dated the 23rd May, 1831, for £1,000, accepted by Lord Foley, and payable eleven months after date. At the trial, before Lord Denman, Chief Justice, at the Middlesex sittings, after Michaelmas term, 1834, the defence was that the bill, as between the drawer and acceptor, was a mere accommodation bill, and had been issued by the defendants to a bill-broker, to get discounted, and that the latter had, fraudulently and without any authority, sold it to one Howard, for whom the plaintiff discounted it. On the evi-

dence it was contended that the plaintiff had not used due caution, and that he had taken the bill under circumstances which ought to have excited the suspicion of a prudent man; that the bill had not been fairly obtained, and therefore he was not entitled to recover. *Lord Denman*, Chief Justice, told the jury to find for the plaintiff if they thought he had not been guilty of gross negligence in taking the bill, under the circumstances given in evidence. A verdict having thereupon been found for the plaintiff, a motion was afterwards made for a new trial, when the following judgments were delivered:—*Lord Denman*, Chief Justice, said—"I used the expression 'gross negligence' advisedly; because I thought nothing less ought to have prevented the plaintiff from recovering on the bill." Mr. *J. Littledale* said—"There must be 'gross negligence,' at least, in a case like the present, to deprive a party of his right to recover on a bill of exchange." Mr. *J. Taunton* said—"I think the case was properly submitted to the jury. I cannot estimate the degree of care which a prudent man should take. The question, as put by the Lord Chief Justice, whether the plaintiff was guilty of 'gross negligence' was most definite and appropriate. Mr. *J. Pattison* said—"I never could understand what was meant by a party's taking a bill 'under circumstances which ought to have excited the suspicions of a prudent man.'" The rule for a new trial was therefore refused.

The point again rose in *Backhouse* v. *Harrison* (5 Barnewall and Adolphus, 1098; and 3 Neville and Manning, 188). This was an action by the plaintiff, an officer of the York City and County Banking Company, upon two bills of exchange for £26. 19*s.* 6*d.*, and £20 indorsed to the company, against the defendant as an indorser. At the trial, before Mr. J. Alderson, at the Yorkshire Spring Assizes, 1833, it appeared, that about two o'clock p.m. on the 5th of September, 1832 (being the first day of Howden Fair), a man dressed like a sailor, accompanied by another person dressed in the same manner, came to the Company's office at Howden, and requested one Clough, their clerk, who managed their business there, to discount the bill for £26. 19*s.* 6*d.* The bill being much discolored, Clough asked how it came to be so. The man said it had fallen, with his pocket-book into the Knottingley and Goole Canal, and that he had been searching two days and two nights for it. This statement was corroborated by his companion. Clough then looked at the bill, and seeing the names of J. and R. Harrison upon it, asked the man how he came by it. He said he had got it from those gentlemen in payment for a cargo of coals; that he had two vessels in which he traded between Hull and West Riding; and that he had come to Howden to purchase two horses to draw his vessels up and down the canal. Clough then agreed to discount the bill, and offered it to the man to indorse; but he said he could not write.

Upon which Clough wrote the name given to him by the man (William More), to which the latter affixed his mark. Clough stated in evidence, that it was not uncommon for persons unable to write to have such bills. Having received the money for this bill, the man produced the other bill, and said, "That if the money was not sufficient to pay for the horses, he would return, and get the other bill discounted." In an hour and a half he returned for that purpose, and Clough discounted the bill for £20. Clough asked the man if he was known in the town. He said he did not know any one there. The jury returned, as their verdict upon questions specially submitted to them by the judge, "That the plaintiff took the bills *bonâ fide*, but under such circumstances that a reasonably cautious man would not have taken them. They also found that the defendant had not used due diligence in making the loss known."

On the case afterwards coming before the Court of Queen's Bench, the following judgments were delivered:—*Denman*, C.J.—"This case involves a mixed question of law and fact. The law upon the question is not very well settled; and I think the rule should be absolute, if not for entering a verdict for the plaintiff, at least for a new trial. I think, upon the whole, the plaintiff is bound to recover. To constitute a valid defence to the action, it was incumbent on the defendant to show that the agent of the banking company had been guilty at least of gross negligence. The finding

of the jury does not go to anything like that extent, nor was there any evidence to warrant such a finding." *Littledale*, J., said—"It was no defence to the action that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man, and that it had not been fairly obtained. The defendant was bound to show that the plaintiff had been guilty of gross negligence. That was decided in *Crook* v. *Jadis*. The plaintiff is therefore entitled to recover." *Taunton*, J., said—"*Crook* v. *Jadis* shows that the plaintiff is entitled to recover, unless gross negligence has been made out. That was not found by the jury; and I think the negligence proved was not sufficient to warrant such a finding. The other point does not arise." *Patteson*, J., said—"I am of opinion that the first fact found by the jury did not amount to a defence to the action. I have no hesitation in saying, that the rule first laid down in *Gill* v. *Cubitt*, and acted upon in these cases, that a party who takes a bill under circumstances which ought to have excited the suspicion of a prudent man cannot recover, has gone too far, and ought to be restricted. I can perfectly understand that a party who takes a bill fraudulently, or under such circumstances that he must know the person offering it to him has no right to it, will acquire no title; but I never could understand that a party who takes a bill *bonâ fide*, but under the circumstances mentioned in *Gill* v. *Cubitt*, does not

acquire a property in it. I think the fact found by the jury here, that the plaintiff took the bills *bonâ fide*, but under such circumstances that a reasonably cautious man would not have taken them, was no defence." A rule absolute for a new trial was granted.

These last-mentioned decisions were approved in *Goodman* v. *Harvey* (4 Adolphus and Ellis, 870; and 6 Neville and Manning, 372). Lord *Denman* there said—"I believe we are all of opinion, that gross negligence only would not be a sufficient answer by the defendant, when the plaintiff has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine." See also *Raphael* v. *Bank of England* (17 C. B. 161; 25 L. J. (C.P.) 33).

7. *Lost cheque which cannot be produced.*

The drawer of a cheque will not be liable unless indemnified on a cheque which has been lost, and cannot be produced by the last holder.

In the following case, on the 27th of February, 1809, the defendant purchased £70 Five per Cents., belonging to the plaintiff, for £69. 7*s.* 6*d.*, and the same day gave her a cheque for that sum on his bankers, Messrs. Walpole & Co. She lost the cheque on her way home from the Stock Exchange. He was immediately apprised of the fact; and at various times down to the month of June following,

was requested to pay for the stock; but he always refused to do so unless he had an indemnity against his liability on the cheque. Messrs. Walpole & Co. became bankrupts in the month of May in the same year, without the cheque having ever been presented for payment. The defendant proved for the amount of the cheque under their commission, but had not received any dividend at the time the action was commenced.

Garrow, for the plaintiff, insisted that the cheque could not operate as payment of the stock, and that the defendant was still bound to pay the £69. 7*s*. 6*d*., without receiving any indemnity. Long before the commencement of the action he had ceased to be liable on the cheque, according to the principle of *Tindal* v. *Brown* (1 Term Reports, 167). After the bankruptcy of Walpole & Co. a holder of the cheque could not have maintained an action upon it against the drawer; and even in a short time from the loss of the cheque, and whilst Walpole & Co. continued to pay, it must have come into the hands of any person under circumstances of such suspicion, that Brown could not have been sued upon it, if he had withdrawn the money from the bankers and paid it to the plaintiff. It will be seen from what has been previously stated, that some of these arguments are not maintainable.

Lord *Ellenborough* said—"It is certainly possible that this cheque may have got into the hands of a person who might maintain an action upon it. The very day it was lost it might have been passed for

value to a *bonâ fide* holder, without notice. I therefore think the defendant was entitled to an indemnity. He could not, without this, have safely withdrawn the money from Walpole & Co. before their bankruptcy. He then ceased to be liable upon the cheque, but the money was gone. Besides the bankruptcy of Walpole & Co. may not be sustainable, and the defendant is not to be exposed to the risk of the commission being superseded." The plaintiff was nonsuited. *Bevan* v. *Hill* (2 Campbell, 381).

But the drawer of a cheque may make a special agreement to pay a lost cheque, and will be bound by such agreement. This appears to be established by the following case, although the action there failed, because it had been brought in a wrong form. Assumpsit for money paid, and on account stated. Plea—*Non assumpsit*. At the trial before Lord Abinger, C.B., at the London sittings after Michaelmas Term, 1837, the following facts appeared in evidence. The plaintiffs were bankers in the city of London; the defendant was an attorney. Henry Tribe, the brother of the defendant, was the secretary of the Killewerris Mining Company, whose account was kept with the plaintiffs. On the 21st November, 1835, the defendant drew his cheque on the Bank of England for £100, payable to Henry Tribe, who afterwards paid it on his own account into the banking-house of the plaintiffs, to the credit of the Killewerris Mining Company. The cheque was lost by the plaintiff's servants, and was never

afterwards found. Upon the discovery of the loss the following correspondence took place between the plaintiffs and the defendants :—

"To Edward Tribe, Esq., 86, Great Russell Street.

"Sir,—On or about the 23rd or 24th November last we received, on account of the Killewerris Mining Company, a draft drawn by you on the Bank of England for £100, in favour of Mr. Henry Tribe, dated on one of the above-mentioned days, which draft was lost or accidentally destroyed by us; and notwithstanding we have endeavoured to find it by a diligent search, we have not succeeded. We therefore request the favour of your giving a fresh draft in lieu of it for the same sum; and hereby indemnify you from all loss which you may sustain by so doing, and beg to thank you for the trouble you have already taken in requesting the Bank of England to stop the missing draft, in case it has been presented.

"We are, Sir,
"Your most obedient Servants,
"Lubbock & Co."

"To Sir J. Lubbock & Co.
"March 25th, 1836.

"Gentlemen,—Yours of the 24th instant brings under my notice what had escaped my attention. I am leaving home to-day for a short time, and send my book to the bank to be made up. On my

return I shall have the pleasure of handing you a fresh draft, on the terms contained in your letter.

"I am, Gentlemen,

"Yours obediently,

"EDWARD TRIBE."

On the 20th July, the plaintiffs wrote to the defendant, stating that they had been called upon by the Killewerris Company to place to their account the sum of £100, due to them in respect of the cheque. The correspondence between the plaintiffs and the defendant continued down to the 17th May, 1837, and on the 25th this action was brought. During the whole of the correspondence, and after the commencement of the action, the defendant promised to pay, but requested indulgence. The particulars of the plaintiffs' demand, dated 8th June, 1837, were to the following effect, "The plaintiffs in this case delivered to you the receipt for the £100 paid on your behalf to the Killewerris Consolidated Mining Company on the 21st November, 1835, and from this date the Company debited the plaintiffs with the amount of this sum, and treated it as paid to them. The plaintiffs delayed to make the entry in their own books, and kept the sum in suspense until the 21st April, 1837, when the credit was finally written into the Company's credit, into their own books." The plaintiffs then stated the reason of their so doing. The jury found for the plaintiffs, damages £100. A rule having been obtained, calling on

the plaintiffs to show cause why this verdict should not be set aside, and a nonsuit entered,

Maule showed cause.—"This is a case in which the jury were justified in finding that the money had been paid to the use of the defendant, for it is a payment according to the express direction of the defendant, and discharges a debt for which he was liable."

Platt, contrà.—"The defendant gave the plaintiffs no authority, either express or implied, to pay this money. Nor does it appear that any money ever passed from the plaintiffs to the Company. The settlement of accounts between the parties may have been effected by the Company being allowed to overdraw their account to the extent of £100. In that case no action could be maintained on the count for money paid; nor can the plaintiffs succeed upon the account stated, for no debt is due from the defendant to them."

Alderson, B.—"Does the letter of the defendant amount to anything but a promise to perform an agreement? There is no acknowledgment of any antecedent debt. The plaintiffs are indebted to the Company for the money received from Henry Tribe, and the defendant promises that if they will pay that debt he will repay them. This case falls within the principle of *Spencer* v. *Parry* (3 Adolphus and Ellis, 331, 1 Harrison and Wollaston, 179, 4 Neville and Manning, 770); and *Hansard* v. *Robinson* (7 Barnewall and Cresswell, 90)."

Parke, B.—"This action is not maintainable,

either on the count for money paid, or on the account stated. The money in question was not paid by the plaintiffs to exonerate the defendant from his liability, for as soon as the cheque was paid into their hands, they became answerable to the Company for the amount. The correspondence, indeed, shows an agreement, and on that agreement an action might be maintained. Still, there is no payment of money to the use of the defendant; the money is paid to the bankers on account of the Company. This case falls within the principle of *Spencer* v. *Parry*. Nor can any action be maintained on the account stated, as that account has reference to money actually due and owing. The plaintiffs must bring their action for the breach of the special agreement."

Bolland, B.—"No debt was due from the defendant to the plaintiffs for which the former was liable in an action for money paid. With regard to the account stated, the rule of law is clear, that that which is relied upon as proving an account stated, must furnish evidence of a subsisting debt."

Alderson, B., concurred

Rule absolute. *Lubbock* v. *Tribe* (1 Horn and Hurlstone, 160). The 9 & 10 Wm. 3, c. 17, s. 3, respecting the giving another bill of exchange in the place of one lost, does not seem to apply to a cheque, the statute referring only to an inland bill, above the value of £5, *payable at a certain time after date*, expressed to be for value received and lost within the time limited for payment.

Now by 17 & 18 Vict., c. 125, s. 87, it is provided in case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court, or judge, or a master, against the claims of any other person upon such negotiable instrument.

8. *Cheque which has been destroyed.*

If the cheque can be proved to have been destroyed, the holder may recover from the drawer the amount of it, upon proving the destruction, and also the contents. The distinction between a lost cheque and a cheque which has been destroyed, so far as relates to the right to recover, is that the one may get into his hands of a *bonâ fide* holder, but the other cannot. In *Pierson* v. *Hutchinson* (2 Campbell, 211), Lord *Ellenborough* said—"If the bill were proved to be destroyed, I should feel no difficulty in receiving evidence of its contents, and directing the jury to find for the plaintiff." See also *Wain* v. *Bailey* (2 Perry and Davison, 507); and *Blackie* v. *Pidding* (6 C. B. 196). A Court of equity will not entertain a suit to recover the amount of a destroyed instrument, the remedy being at law: *Wright* v. *Maidstone* (24 L. J. (Ch.) 623.) A cheque upon the Accountant General was alleged to have been accidentally des-

troyed. The Court, though not satisfied with the evidence of its destruction, directed the issue of a new cheque, on the ground that the other cheque being more than a year old would not be paid if presented: *Taylor* v. *Scrivens* (1 Beav. 571).

9. *Drawer fraudulently inducing banker to honour cheque.*

Prisoner having overdrawn his bankers, and wishing to induce them to answer other cheques drawn by him, placed in their hands a bill drawn by himself on J. G., which he assured them was a good one, and on the faith of which they paid several cheques of his, in the hands of other persons. The prisoner was convicted, on the ground that the bill was altogether a false pretence. On case reserved, however, the judges held the conviction wrong, as the prisoner could not be said to have received any specific sum on the bill; all that he obtained was credit in account; the money having been received by other persons: *Rex* v. *Warell* (1 Ryan and Moody, 224). A drawer of a cheque who tampered with his own signature, and tried to represent it as a forgery, and thereby defraud his bankers, was held to be guilty of a fraud, but not of a forgery: *Brittain* v. *Bank of London* (3 F. & F., 465).

CHAPTER II.

OF THE DRAWER OF A CHEQUE.

Part II.

THE RIGHTS AND LIABILITIES OF THE DRAWER OF A CHEQUE, WHICH ARISE FROM HIS FILLING SOME PECULIAR CHARACTER.

1. *On the rights and liabilities of the principal when the cheque is drawn by an agent.*
2. *On the liability of a director of a railway or public company, or a bank officer, or any other description of agent, who is the drawer of a cheque.*
3. *When the drawer is an assignee in bankruptcy or a trustee.*
4. *Partner.*
5. *Lunatic.*
6. *Infant.*
7. *Married woman.*
8. *Executors and administrators.*

1. *On the rights and liabilities of the principal when the cheque is drawn by an agent.*

When the drawer of a cheque is acting in pursuance of an authority, the principal will not be liable if the drawer has not followed strictly the terms the authority prescribes.

A question of this sort arose in *Whitmore* v. *Wilks*, before referred to, with respect to the sum

of £375, under the following circumstances. The paving and lighting accounts of the parish of St. Luke's were kept separate, and there were different bankers for the two; but this sum of £375 had been erroneously placed to the wrong account. By the provisions of the Act of Parliament, all orders for the payment of money ought to be signed by three trustees, at least, at a meeting. Milne, however, had prevailed on three trustees separately, at their respective houses, to sign an order on the bankers, to whom the £375 had been paid, to pay that money over to him, on the pretence of transferring it to the right account; and, having obtained the order, he received the money from one banker, but never paid it over to the other, or accounted for it. This was one of the sums the trustees of the parish sought to recover from Wilks. Lord *Tenterden*, in summing up, said—"I think the plaintiffs are not entitled to recover the £375; the trustees are prevailed upon by Milne irregularly to sign the order for that sum. They ought not, by the provisions of their act, to have done so, except at a meeting; but Milne prevails on them, and they do it. This was an act clearly out of the scope of Milne's duty to Wilks, or of Wilks to the trustees. I think, therefore, that Wilks is not answerable for it, for it was without the duties which Wilks had appointed Milne to perform, and for which he had constituted him his agent." If the provisions of the Act of Parliament had been attended to, and the three

trustees had drawn the order at a meeting, and then handed it to Milne, as acting clerk in the place of Wilks, probably the latter would have been held liable. The trustees, therefore, lost their remedy, because they did not draw the cheque in the manner prescribed by the Act of Parliament. This point may become extremely important to bankers. Thus it is well established, that if a bill or note import to be drawn, accepted, or indorsed by procuration, it will not bind the principal unless it be within the agent's power; and the rule seems clearly applicable to cheques. Suppose, then, a customer to a banker to give a party a power of attorney to draw cheques for him for any particular purpose, or at any particular time, the banker should satisfy himself that the attorney has strictly followed the power, or he may become liable to the principal. In a case relating to bills, although the East India Company saw the power under which the agent acted, and registered it in their books, yet they paid an indorsement which it did not warrant, and the principal enforced payment over again from the Company: *East India Company* v. *Tritton* (3 Barnewall and Cresswell's Reports, 280); see also *Field* v. *Mackenzie* (17 L. J. (C.P.) 98; *Serrell* v. *Derbyshire, &c., Company* (15 L. T., 254). It is said, however, that signing "*for A. B.*" is not equivalent to "*per proc.*" The former words do not import special and limited authority, but the latter do: *O'Reilly* v. *Richardson* (17 Ir.

C. L. Rep. 74). An agent cannot overdraw his principal's account with his banker, without express or implied authority: *Pott* v. *Bevan* (1 C. and K., 335).

2. *Liability of drawer of cheque who is a director of a railway, or public company, or a bank officer, or any other description of agent.*

When the drawer of a cheque is merely an agent, he has, in some cases, been held to be personally liable. Thus, in *Leadbitter* v. *Farrow* (Bayley, 69), plaintiff wanted a bill upon London for £50, and sent to defendant, whom he knew to be agent to the Durham Bank at Hexham. Defendant drew a bill accordingly :—

"Pay to the order of Mr. Leadbitter, £50 value received, which place to the account of the Durham Bank, as advised. "C. FARROW.
"To Messrs. A. and B., London."

In an action thereon, the defendant urged that he was not personally liable, or at least that the plaintiff, who knew him to be only an agent, could not sue him, but on a case reserved; the Court held his signature pledged his own credit, and that only, and that he was therefore liable. Again, in the case of *Eaton* v. *Bell* (5 Barnewall and Alderson, 30), defendants were Inclosure Commissioners, and plaintiff the banker under the

Act. The Act authorized the commissioners to raise money by rate, and directed that persons advancing money for the purposes of the Act should be repaid with interest out of the moneys the commissioners should raise. Defendants drew on the plaintiffs in this form :—

"Messrs. Eaton,—Pay A., or bearer, £40 on account of the public draining, and place the same to our account as Commissioners of the Frodsham Inclosure."

Plaintiff sued the defendants personally, and the judge left it to the jury whether credit was given by the plaintiff to the defendants personally, or to the fund they had to raise. The jury thought it given to defendants personally, and on case the court thought them right, and plaintiff had judgment. The practical conclusion to be drawn from these authorities is, that when the drawer of a cheque is an agent, and does not intend to become personally responsible, he must express his intentions upon the face of the instrument.

But these cases have frequently been doubted. In Story's Commentaries on the "Law of Agency," the author makes the following remarks on this point :—

"The case of *Thomas* v. *Bishop* (2 Strange's Reports, 955), would make one pause as to the extent to which the doctrine should be carried. There, a bill was drawn on the defendants as

follows: At thirty days' sight, pay to J.S., or order, £200 value received of him, and place the same to account of the York Buildings Company, as per advice from Charles Mildmay. To Mr. Humphrey Bishop, cashier of the York Buildings Company, at their house in Winchester Street, London.' The defendant accepted it as follows: 'Accepted 13th June, 1832, *per* H. Bishop.' The bill being dishonoured when due, an action was brought against Bishop personally, and it was held that he was personally liable on the acceptance. The only point of doubt is, whether a bill so drawn is not to be deemed as drawn on the cashier officially, and accepted by him officially; and therefore as excluding a personal responsibility. Suppose a cheque drawn on the cashier of a bank as such, and accepted by him, would he be personally responsible on the acceptance, or would the bank be responsible? Drafts drawn on, and accepted by, cashiers of banks, are usually treated as official transactions and binding on the bank, and not merely on the cashier personally.

"In *Shelton* v. *Darling* (2 Connecticut Reports), a bill was drawn on an agent as follows: 'A. B., agent of the Commission Company, ninety days after date, please to pay to our order two thousand dollars, value received, and charge to account. Your obedient servants, D. and C.' On which there was an acceptance as follows: 'Accepted, A. B., agent, C. C.' It was held that A. B. was not personally liable thereon, although it was proved

that he procured the bill to be drawn and to be discounted for his own use."—Story, on "The Law of Agency," page 231.

Several cases are in conformity with these views; thus it has been held, that if one partner in a bank signs the notes of the firm, he is not separately liable. *Ex parte Buckley re Clarke* (14 L. J. (Ex.) 341). See also *Downman* v. *Jones* (14 L. J. (Q.B.) 226); *Jenkins* v. *Hutchison* (18 L. J. (Q.B.) 274). In *Other* v. *Iveson* (24 L. J. (Ch.) 654), it was held that a cheque signed by three persons created a joint and not a several liability. A person who signed as secretary for a company was held not personally liable (*Alexander* v. *Sizer*, 38 L. J. (Ex.) 69). But, on the other hand, in *Gray* v. *Raper* (1 L. R. (C. P.) 694), the executive committee of a co-operative society who signed as such was held liable; and in *Courtauld* v. *Saunders* (16 L. T. (N.S.) 562), it was held that an equitable plea by the directors of a company, that the form of the document was a mistake, and that they did not intend to bind themselves personally, could not be supported, because the payee maintained that he had always relied on their personal liability.

A clerk who draws a cheque in the name of his master, and by his authority, is not liable on it: *Wilson* v. *Barthrup* (1 Jur., 949).

The Act for regulating joint-stock banks—7 & 8 Vict., c. 113—after providing that bills of exchange and other instruments are to be signed by a particular officer on behalf of the company,

declares, by section 22, that "nothing therein contained shall be deemed to make any such officer liable upon such bill of exchange or promissory note, to any greater extent, or in a different manner, than upon any other contract signed by him on behalf of such company"; but that such company shall be liable thereon, as fully as if their common seal had been affixed. This Act is repealed by "The Companies Act, 1862," but sec. 206 seems to preserve the privileges and rights of companies then established. By 30 & 31 Vict., c. 131, s. 37, any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company. As to the power of a board to authorize certain of their body to draw cheques, see *Ex parte Midland* (23 L. J. (Ch.) 140).

3. *When the drawer is an assignee in bankruptcy, or a trustee.*

A creditor who had proved his debt under a commission, petitioned for payment, by one of the two assignees, of his dividends which had been declared under this commission. The commission issued in November, 1819; and Brind and Shackell were duly chosen assignees, and the usual assignment executed by them. On the 18th of December, 1819, the petitioners proved

a debt of £152. 8*s*. 6*d*., which, by payment of one of the bills of exchange which were securities for the debt, was subsequently reduced to £101. 12*s*. 4*d*. On the 17th of June, 1820, a dividend of 3*s*. in the pound, and on the 23rd of June, 1821, a further dividend of 2½*d*. in the pound, were declared; and such dividends amounted to the sum of £16. 6*s*. on the said sum of £101. 12*s*. 4*d*. Shackell had become bankrupt; and the petition prayed payment by Brind of the sum of £16. 6*s*. Assets of the bankrupt were regularly in the hands of the bankers appointed by the creditors, in the joint names of Brind and Shackell. Upon the declaration of the dividends, Brind signed cheques upon the bankers, purporting to be the joint cheques of himself and Shackell, for the dividend of each creditor, and delivered them to Shackell, who undertook to affix his signature, and to distribute the cheques to the creditors as they applied for the same. The creditors were very numerous; and all of them, except the petitioners and four or five others, whose debts were very small, duly applied for and were paid their dividends. The petitioners delayed their application until April, 1824, and at that time Shackell had become bankrupt; and it appeared that the cheques for the dividends of the petitioners had been signed by Shackell, and deposited by him in a desk, from which they had been fraudulently taken by one of his clerks, and that they had been paid by the bankers.

It was contended that Brind was answerable; and that by surrendering the whole power over the funds to Shackell, he had deprived the creditors of the security they had provided and facilitated the commission of the fraud which had occurred.

The *Vice-Chancellor*—"If the question had been whether Shackell was answerable for the amount of these dividends, it might have admitted of little doubt. It does not appear that he dealt so providently with these cheques as he ought to have done. Whether Brind is to be responsible for them, is a very different question. It is true that the assignees are trustees, who have only a joint and not a separate authority; and if, by the act of one assignee out of the course of his duty, the trust property is placed within the single power of the other assignee, there is no doubt but both are liable. Here it was not to be expected that the assignees were to meet upon the application of every creditor for the purpose of signing and delivering his dividend cheque. Such a course of proceeding would have been highly inconvenient to the creditors themselves. It is not the practice of bankers to receive the dividend cheques, and to pay each creditor upon his application; the trouble is greater than they are willing to undertake. Of necessity, therefore, some single person is to be selected for the distribution of these cheques; and it is obvious that there is greater security if one of the assignees will undertake

the office, than if it be entrusted to an agent: because there may be cases in which circumstances of convenience would not require that the joint cheque should be signed by that assignee until the application of the creditor, and until the time of delivering the cheque. Upon the whole, I am of opinion that the delivery of these cheques by Brind to Shackell, as his co-assignee, was an act done in the proper execution of his duty as a trustee: and that he is not responsible for the subsequent loss of these cheques. *Ex parte Griffin and Others* in the matter of *Dixon* (2 Glyn and J., 114). By 12 & 13 Vict., c. 74, the Court of Chancery is empowered, on petition, to order money deposited with a banker to be paid to some of several trustees for the purpose of being paid or delivered to the Accountant-General. Trustees of a benefit building society are not responsible for cheques drawn by them on the authority of the directors, although such cheques may be used for purposes not warranted by the rules. *Grimes* v. *Harrison* (28 L. J. (Ch.) 823).

4. *Partner.*

If a cheque be signed in the name of the firm by either partner, the whole firm will be liable as drawers, notwithstanding the partner, by so doing, may have violated some private arrangement between himself and co-partners, and the bankers will be bound to pay such cheques unless they have entered into a special agreement to the contrary: see "Byles on Bills," p. 30.

5. *Lunatic.*

If a lunatic draw a cheque, he will be liable to pay it to any *bonâ fide* holder, who has taken it without notice of the lunacy. The law being, that where a person, apparently of sound mind, and not known to be otherwise, enters into a contract, which is fairly executed, the contract cannot be afterwards set aside, either by the alleged lunatic or by those who represent him: *Molton* v. *Camroux* (18 L. J. (Ex.) 68). See also *Rock* v. *Slade* (7 Dowling, 22).

6. *Infant.*

If the drawer of a cheque be an infant, he cannot be made liable upon it: *Williamson* v. *Watts* (1 Campbell, 552).

7. *Married Women.*

Except so far as a married woman is now empowered by the 33 & 34 Vict. c. 93, she cannot enter into any binding contract at law; and where her husband suffers her to keep a separate account with a banker, he will be bound by her signature to the cheques, to the extent of the funds in the banker's hands on such separate account; but probably the banker could not sue the husband in the event of the account being overdrawn.

The Acts of Parliament regulating savings banks enable such banks to treat married women as if they were unmarried, unless the husband should give notice to the contrary. See *Moses* v. *Levi* (3 Y. & C. 359), *West* v. *Wheeler* (3 Car. & K.

714), *Freestones* v. *Butcher* (9 Car. & P. 643), *Agar* v. *Blethyn* (5 L. J. (N.S.) (Ex.) 36, 2 Cr. Mee & R. 669, 1 T. & G. 160); *Calland* v. *Lloyd* (6 Mee & W. 26); Bankers' Mag., 1852; *Lindus* v. *Bradwell* (17 L. J. (C.P.) 121).

The Act 33 & 34 Vict., c. 93, s. 1, enacts:—"The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money and property." S. 11:—"A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property, by this Act declared, to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any

chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property." It seems, therefore, so far as regards the property enumerated, a married woman may keep a banker and draw cheques, and sue and be sued thereon.

8. *Executors and Administrators.*

"One of several executors has power to act individually, and without the concurrence of the co-executors."—"Williams on Executors," 683. It is therefore apprehended that where a testator has a balance at his bankers, any one of the executors might draw it out, although such a course would be so unusual that a banker might be justified in hesitating to sanction it; but after the account is altered into the names of the executors a new arrangement is generally made with regard to the signing of cheques, which would exonerate the bankers who acted on it, whatever might be its effect on the liabilities of the executors between themselves: *Clough* v. *Bond* (3 M. and C. 490). A Probate is conclusive protection to all who act under it, although it may have been granted in respect of a forged will: *Allen* v. *Dundas* (3 T. R. 125). And so is an administration, although a will may exist, and be afterwards proved: *Prosser* v. *Wagner* (26 L. J. (C.P.) 81).

CHAPTER III.

RIGHTS AND LIABILITIES OF HOLDERS.

1. *Of cashing a cheque when holder is a bailee.*
2. *Of cashing a cheque after bankruptcy of drawer.*
3. *Right of holder to obtain payment of cheque not presented in due time.*
4. *Time to present a cheque.*
5. *When parties live in different places.*
6. *When a banker is employed.*
7. *Holder may present cheque at any time within six years.*
8. *Indorsers and transferrors of cheques.*
9. *Circumstances under which holder entitled to receive payment of cheque from assignees.*
10. *Effect of losing a cheque.*
11. *Notice of the dishonour.*
12. *Remedies of the holder of a cheque.*

1. *Of cashing a cheque when the holder is a bailee.*

The holder of a cheque to be kept in trust for other parties, and to abide the result of certain experiments; or, in other words, a stakeholder is not guilty of a breach of duty in cashing the cheque, provided the parties treated the cheque as money. In a case of this sort, Mr. J. *Coleridge* said—"I was much struck with the argument as to the

breach of duty by the defendant, and I can conceive many cases of inconvenience that would arise by the conversion of a cheque into money. But here the cheque was considered as money from the commencement": *Wilkinson* v. *Godefroy* (3 Perry and Davison's Reports, 413; 9 Adolphus and Ellis, 536).

In another case, in which a somewhat similar question arose, the Court said—"The principle to be extracted from all the cases is, that, where the thing is immediately convertible into money, and has been treated as such, it may be sued for accordingly. In the present case, it was left to the jury to say whether the cheque had been treated as money. They found that it had, and there is no doubt but that their finding was correct": *Spratt* v. *Hobhouse* (12 Moore, 402).

2. *Of cashing a cheque after bankruptcy or insolvency of drawer.*

The holder of a cheque has no right to get it cashed if he has received notice that the drawer has committed an act of bankruptcy; and it has also been held that he has no right to get a cheque cashed by the bankers, when he knows the drawer is insolvent, and has no funds at the bankers, and the bankers can recover from him the amount of a cheque they may have so paid: *Martin* v. *Morgan* (1 Gow. 123).

3. *Right of holder to obtain payment of cheque from transferror which has not been presented in due time, and banker has failed, and the failure is unknown to the transferror.*

A., on Tuesday, the 17th November, applied to B. to change a cheque for £10. 10s., drawn by C. on certain bankers. B. did so, and kept the cheque till the following Saturday, the 21st of November, when he paid it to his bankers for collection. On Monday, the 23rd of November, the bankers upon whom the cheque was drawn stopped payment, and the cheque was not paid by them.

On the evening of that day B. told A. the cheque had been returned, but concealed the fact that the bankers had stopped payment, which A. did not know. A. thereupon gave B. £5, and an I.O.U. for £5. 10s., and took back the cheque. It was proved that C. had funds in the hands of the bankers upon whom the cheque was drawn at the time they stopped payment. It was decided that the suppression by B. of the fact that the bankers had stopped payment, and the statement that the cheque had been returned, amounted to such a fraud upon A., as would entitle him to recover back the £5, in an action for money had and received: *Billing* v. *Ries* (Carrington and Marsham's Reports, p. 26). So, if a banker should give an accountable receipt for a cheque which is dishonoured, he cannot be made liable on such receipt: *Timmis* v. *Gibbins* (21 L. J. (Q.B.) 403).

4 *Time to present a cheque under ordinary circumstances.*

The holder of a cheque should, in general, present it for payment within the day after it is received, if he reside in the same place as the banker upon whom it is drawn; otherwise, if the banker fail with funds of the drawers, the holder will have to bear the loss: *Rickford* v. *Ridge* (2 Campbell, 537), *Moule* v. *Brown* (Arnold, 79), *Beeching* v. *Gower* (Holt, 315), and *Alexander* v. *Birchfield* (3 Scott, 555).

5. *Time to present, and manner of presenting, cheque when parties live in different places.*

A cheque for £4,700, drawn upon the Lutterworth Bank, was given to A., at Lutterworth, on the 20th of April, after banking hours, in payment for an estate. A., who lived three miles from Lutterworth, immediately handed the cheque to B., to be placed to A.'s account at the Rugby Bank. Rugby is six miles from Lutterworth. On the arrival of the cheque the same day at Rugby, the Rugby Bank had closed; but the cheque was deposited with one of the partners of that bank for the night, and in the morning of the 21st of April it was paid into the bank, and on the same day transmitted by post to the Lutterworth bankers, with directions to send the amount to London. The Lutterworth bankers received the

cheque early on the 22nd, and at half-past 1 on that day stopped payment. Held, that A.'s course of proceeding was reasonable, and the presentment of the cheque was in time to prevent it becoming his: *Bond* v. *Warden* (1 Coll. C. C. 583).

The case of *Moule* v. *Brown* (Arnold, 79) contains much interesting discussion on this point.

It was an action by the public officer of the North Wilts Banking Company, upon a cheque drawn on Moger & Co., bankers at Bath, and cashed by the North Wilts Bank for the defendant. The declaration contained the usual averment that the cheque had been duly presented and dishonoured. The second plea traversed this averment.

At the trial before Patteson, J., at the last Wiltshire assizes, it appeared that the cheque had been cashed on the 28th March, at Malmesbury, where there was a branch office of the North Wilts Bank; that, on the same day, the cheque was forwarded to the chief office at Melksham (about eighteen miles distant from Malmesbury), where it was kept till the 30th, on which night it was sent by a private hand to Bath (about twelve miles distant from Melksham), and that it was presented to Moger & Co. on the 31st, and was dishonoured.

It was also shown that it was the course of business of the North Wilts Bank to transmit cheques which had been paid into the branch bank, to the principal office. The question was, whether there had been any *laches* on the part

of the North Wilts Bank. *Patteson*, J., was of opinion that there had been, and consequently directed the jury to find for the defendant upon that issue; they found, however, a verdict for the plaintiff. On application to the Court, the verdict was set aside, and *Tindal*, C.J., said: There is no doubt that when a party is bound to give notice of dishonour, and he has not done so within the ordinary time, it is competent to him to show the existence of any particular facts which would take the case out of the general rule; such, for instance, as that he could not find the person to whom the notice was to be given; but it is incumbent on the party who seeks to escape from the rule, clearly to establish the existence of such facts. I do not see anything in this case to take it out of the general rule that has been established by a variety of decisions, viz., that the holder of a cheque ought to present it on the following day from that on which he receives it. That rule was established in *Robson* v. *Bennett* (2 Taunt. 388), and has been recently confirmed in *Boddington* v. *Schlencker*. On the authority, therefore, of these cases, I am of opinion that there has been *laches* in this instance on the part of the North Wilts Bank."

The other judges concurred. *Moule* v. *Browne* (Arnold's Reports, 1838, p. 79; C. P. 4 Bing. N. C. 266; 5 Scott, 694).

6. *Time to present a cheque when a banker is employed.*

It has been decided that the holder of a London cheque cannot gain an extra day for presentation by paying the cheque into his bankers, instead of presenting it himself: *Alexander* v. *Birchfield* (3 Scott, 555).

This case is hardly to be relied upon now, for since the time when it was decided, the practice of employing a banker has become much more general, and the crossing of cheques has been recognised by the Legislature. It may, therefore, be contended that there is now a custom authorizing the employment of a banker with its attendant consequences. At all events, the Court in that case said: "The party who receives the cheque "may always protect himself against any danger "from the insolvency of the drawee, where he "intends the cheque to pass through his bankers, "by stipulating that the bankers' names should "be crossed upon the cheque." If the drawer should himself cross the cheque, that would certainly amount to an agreement on his part that it should be presented through a banker.

In *Bodington* v. *Schlencker* (4 Barnewall and Adolphus, 752), an attempt was made to limit the time allowed to present a cheque through a banker, but it did not succeed.

See also *Hare* v. *Henty* (30 L. J. (C.P.) 302), *Prideaux* v. *Criddle* (20 L. T., 695); and see the subsequent chapter on "The Banker."

7. *Holder will not discharge the drawer by delaying the presentation for any period within six years, unless the drawer has sustained loss by the delay.*

The drawer of a cheque is liable to the holder at any distance of time within six years from the date, unless he sustain a loss from the non-presentment of the cheque.

Serle v. *Norton* (2 Moody and Robinson's Reports, 401), *Robinson* v. *Hawksford* (15 L. J. (Q.B.) 377), *Hopkins* v. *Wace* (Law Rep., 4 Ex. 264), *Law* v. *Rand* (27 L. J. (C.P.) 76). If the cheque should not be presented for six years from the date, the Statute of Limitations would be a bar to any claim against the drawer.

8. *Indorsers and transferrors of cheques.*

The indorser of a cheque will be liable to the holder, provided the cheque be duly presented, and notice of the dishonour be given. A transferror who does not indorse, will only be liable to the immediate party to whom he transferred.

9. *Circumstances under which the holder has been held entitled to receive payment of cheque from the assignees of the banker, after his failure.*

Certain parties drew cheques on their bankers, with whom their accounts were already overdrawn, and paid away the cheques, which came to the hands of other bankers. The second

bankers remit to the first the cheques in a printed circular, desiring the amount to be paid to the London correspondent of the second bankers. Notwithstanding this circular, the custom between bankers is to pay one another's cheques by remittances of notes of the bankers sending the cheques direct to those bankers; the understanding being that the cheques should be paid on the day on which they are received, or the day following, either by such remits, or by remits according to the directions of the circular. The first bankers gave the second credit in their books for the amount of the cheques, but became bankrupt three days after receiving them, and without having made any payment or remittances in respect of them, knowing, at the time of receiving the cheques, that bankruptcy was inevitable. The assignees of the first bankers obtained payment from the customers of the full amount of the cheques. Held, that the second bankers were entitled to payment in full of the same amount, out of the bankrupts' estate: *Ex parte Cole, Re Wise* (3 Montague, Deacon, and De Gex, 189). Where a firm paid a cheque into a branch bank in India, to their current account, after the stoppage of the head bank in England, and before the branch had notice of that stoppage, but on the same day the branch received notice of the stoppage, and they stopped. it was held that payment of the cheque in full could not be made: *Re Agra, &c.* (36 L. J. (Ch.) 151).

10. *Effect of losing a cheque.*

If the holder of a cheque lose it, it will be difficult for him to recover the amount. See *Lubbock* v. *Tribe* (Horne and Hurlstone's Reports, 160, and *supra*, page 25).

But it seems that he ought to give immediate notice of the loss to the drawer; and then, in the event of finding the cheque, he may have a remedy against the drawers, although the bankers have failed. In *Sebay* v. *Abithol* (4 Maule and Selwyn, 462), a bill payable at a banker's was lost, and the holder gave notice thereof to the drawer, and after great delay the bill was found, and the holder was held entitled to recover, although the bankers had failed in the interval, with funds of the drawer.

Mr. Justice *Le Blanc* there said—"If we admit the effect of making this acceptance payable at a particular banker's was to make it a draft or cheque upon the banker, and according to this view of the case that the holder would in general be guilty of *laches* if he did not present it at the banker's within a reasonable time, yet in this case, where the bill was mislaid, and the acceptor had notice of that circumstance as much as fourteen or fifteen months after the time when it ought to have been forthcoming, he was no longer bound to keep funds at his bankers to answer the acceptance. Therefore, it cannot be imputed to the holder that he was the cause of

this loss, or had made the bill his own by *laches;* and on this view of the case alone I found my opinion. For, admitting that the defendant is to be considered as the holder of a banker's cheque, yet, when he gave notice that it was lost, the plaintiff was at liberty to withdraw his funds if he had pleased; and, therefore, he shall not be allowed to make the loss arising from the insolvency of his own bankers the other's loss."

11. *Notice of the dishonour of a cheque.*

Notice of the dishonour of a cheque ought to be given in the same manner as in the case of a bill of exchange: *Bailey* v. *Bodenham* (10 L. T., 422). When the drawer has no funds at the bankers to meet the cheque, he will not be entitled to any notice: *Thomas* v. *Fenton* (5 Dowling and Loundes, 28); *Jackson* v. *Carrington* (2 Car. and K., 750). See also ch. 2, par. 2. The holder is not obliged to give notice to the drawer of a dishonoured cheque, in order to charge the party from whom such holder received it. He does enough if he gives due notice of its dishonour to those only against whom he seeks his remedy: *Rickford* v. *Ridge* (2 Campbell, 537). The following form of a notice will save all disputes in point of form, if it be adopted:—

"—— Street, London,
"28th February, 1850.

"Sir,—I hereby give you notice that the cheque

drawn [by A. B.] upon the —— Bank, [and endorsed by you], has been duly presented for payment, but was dishonoured, and is unpaid. I request you to pay me the amount thereof,

"And remain, &c.,

"To Mr. ——. "Y. Z."

12. *Remedies of the holder of a lawful cheque against the banker, and the other parties to the cheque.*

The *bonâ fide* holder of a dishonoured cheque, who has not been guilty of improper delay, whereby the drawer has suffered, has a clear right to recover the amount from the drawer. A cheque may, however, be refused payment from various causes besides the failure of the banker, or the want of effects of the drawer. Thus, payment of a cheque may be stopped, or it may be stale; and in the latter of these cases, it is apprehended that the holder would have no remedy to recover the amount until after the lapse of a reasonable time to enable the banker to make the usual inquiries of his customers. This is the view of the law which is taken in a note in Moody and Robinson's Reports, vol. ii., page 404, where it is said:— "Another reason for the bankers refusing to pay may be the staleness of the cheque, it being understood as a rule of business with regular bankers, not to pay old cheques without inquiry. If, upon the bankers refusing on that ground to pay the

cheque, the holder were to commence an action against the drawer, without giving him an opportunity of authorizing his bankers still to pay the cheque, the plaintiff would probably fail, on the averment of due presentment of the cheque; and the non-presentment in due time might, under such circumstances, support the plea of payment of the original debt by the cheque; although the holder of a cheque who does not present it within a reasonable time is guilty of *laches*, the consequences of such *laches* may vary according to the circumstances of each case."

The holder of a cheque may sue the drawer, although it was not drawn in the holder's favour originally, but has passed through the hands of several intermediate parties; it being clearly settled that cheques are transferrable, either by delivery or by indorsement, although the former is the most usual.

The following remarks of Mr. Justice *Byles* upon this subject deserve attention:—"But where a cheque, instead of being presented for payment in due course, is transferred, and circulates through several hands, it is conceived that there is a distinction between the time of presentment necessary as against the original drawer in the event of the banker's insolvency, and the time necessary to charge the person from whom the cheque was immediately received. The liability of the drawer cannot, it is apprehended, be enlarged by circulating the cheque; and therefore,

in order to charge him, if the banker fail, the cheque, in whose hands soever it be, must be presented within the period within which the payee or first holder must have presented it; but as against the party transferring the cheque to the holder, it is sufficient, whatever be the date of the cheque, to present it, or forward it for presentment, on the day next after the transfer."

As regards the remedies of the holder of a cheque against the indorsers, they are the same as those which he would have on a bill of exchange. He cannot, upon its dishonour, sue a person, not being the drawer, who has passed it without indorsing it; but if it was cashed or received in payment of a debt, he may sue the party from whom he received it for the consideration he gave for it (Chitty, Jun., 45), provided there has been no laches which has caused loss.

The holder does not appear to have any remedy against the banker who refuses payment, unless the banker has entered into an agreement with him to pay it. In such a case, it is conceived the banker would be liable to the holder; what amounts to such an engagement is therefore an object of inquiry.

In *Robson* v. *Bennett*, the Court of Common Pleas said—"A draft was drawn on the 11th of September, on that day it was carried to the house of the drawer, and, in the language of those persons, was marked; the effect of that marking

is similar to the accepting of a bill, for he admits thereby assets, and makes himself liable to pay. It is the practice of the bankers not to pay bills of this description which are presented after 4 o'clock, but to mark them; and it is usual that bills marked on one day are carried to the clearing-house, where the clerks meet, and paid there on the next day. Therefore, it is the same thing as if a banker had written on a cheque, 'We pay this to-morrow at the clearing-house.'"

In *Fry* and *Chapman's* bankruptcy, in the year 1829, several holders of cheques on the bankrupts claimed to prove, alleging that they were equitable assignees of choses in action. The commissioners took time to consider, and afterwards disallowed the claim. (Byles, 2).

A balance at a city banker's cannot, it is apprehended, be attached, to the prejudice of outstanding cheques.

See also *Law Times*, 1871, p. 195.

CHAPTER IV.

RIGHTS AND LIABILITIES OF THE BANKER.

1. *Duty of a banker to pay cheque on presentation.*
2. *Not when funds previously applied in payment of a bill.*
3. *As to account opened by more than one person.*
4. *Act of bankruptcy by drawer.*
5. *Mutilated cheques not payable.*
6. *Fraudulently altered cheques.*
7. *Forged cheques paid by banker.*
8. *Alleged forged cheques.*
9. *Recovery of amount of cheques overpaid.*
10. *Of cheques payable when banker has no assets of drawer.*
11. *Where the drawer and the holder employ the same bankers.*
12. *Recovery of amount of cheque from payee.*
13. *Of cheques cancelled in mistake.*
14. *Death of drawer.*
15. *Of the coin in which a cheque must be paid.*
16. *Of collecting cheques.*
17. *Of bankers' lien on cheques.*

It is proposed now to consider those points in the law of cheques, which peculiarly relate to the duty and liability of the bankers upon whom a cheque is drawn.

1. *Duty of a banker to pay a cheque on presentation.*

There is an implied contract on the part of bankers to pay cheques drawn upon them by a

customer, provided they have sufficient money in their hands, and that the cheque be presented within business hours, and be drawn in a legal manner: *Marzetti* v. *Williams* (1 Barnewall and Adolphus, 415), and *Whitaker* v. *Bank of England* (1 Gale, 54). In the event of bankers dishonouring a cheque under these circumstances, they will be liable to an action by the customer, although their conduct was the result of mistake.

We shall give the judgment of the Court in *Marzetti* v. *Williams*, which is the leading case relating to this important point, at length.

Lord *Tenterden*, C.J., said—"I think that the plaintiff is entitled to have a verdict for nominal damages, although he did not prove any actual damage at the trial. I cannot think there can be any difference as to the consequences resulting from a breach of contract, by reason of that contract being either express or implied. The only difference between an express and an implied contract is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract by circumstances, and the general course of dealing between the parties; but whenever a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence. The Attorney-General was compelled to admit, in this case, that if the action were founded on an express contract, the plaintiff would have been entitled to nominal damages,

although no actual damage were proved. Now this action is, in fact, founded on a contract; *for the banker does contract with his customer that he will pay cheques drawn by him, provided he, the banker, has money in his hands belonging to that customer.* Here that contract was broken; for the defendants would not pay the cheque of the plaintiff, although they had in their hands money belonging to him, and had had a reasonable time to know that such was the fact. In this case a plaintiff might, for the breach of that contract, have declared *in assumpsit.* So, in *Burnett* v. *Lynch* (5 Barnewall and Cresswell, 589), the plaintiff might have declared as for a breach of a contract. It is immaterial, in such a case, whether the action in form be *in tort* or *in assumpsit.* It is substantially founded on a contract; and the plaintiff, though he may not have sustained a damage in fact, is entitled to recover nominal damages. At the same time, I cannot forbear to observe, that it is a discredit to a person, and therefore injurious in fact, to have a draft refused payment for so small a sum, for it shows that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade. My judgment in this case, however, proceeds on the ground that the action is founded on a contract between the plaintiff and the bankers; that the latter, whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should

have received such money, would pay his cheques; and there having been a breach of such contract, the plaintiff is entitled to recover nominal damages."

A jury may give substantial damages in such a case, although no proof may be given of any actual damage: *Rolin* v. *Stewart* (23 L. J. (C.P.) 148). And if a course of dealing has existed whereby the banker has led his customer to believe that cheques will be paid, although the banker may not actually have funds, but only expect them from the realization of consignments, then the banker will not be justified in dishonouring the cheques, until he shall have given notice of an intention to do so: *Cumming* v. *Shand* (29 L. J. (Ex.) 124).

On the other hand the Court of Chancery granted an injunction against such an action, where a bank had debited a customer with bills discounted, but not due, the acceptors having become bankrupt, but the case seems to have been ultimately settled, and compensation made to the customer: *The Agra, &c.*, v. *Hoffman* (34 L. J. (Ch.) 285).

2. *If funds have been previously applied in payment of a bill of exchange made payable at the bankers, but without any further authority to pay, the banker will not be responsible for refusing to pay a cheque presented afterwards.*

This point arose in the case of *Keymer* v. *Laurie* (18 L. J. (Q.B.) 218), which was against

bankers for not paying a cheque for £7. 11s. drawn upon them by the plaintiff, the declaration alleging that the defendants had sufficient funds of the plaintiff in their hands for the purpose. One of the pleas denied that the defendants had sufficient funds of the plaintiff in their hands, on which issue was joined.

At the trial before Lord Denman, C.J., at the sittings at Guildhall, after Hilary Term, the plaintiff proved that he kept an account with the defendants, and that on the 7th of March there was standing to his account a sum of £21. 4s., and that on the 25th of March he drew a cheque for £13. 13s., which was duly paid by the defendants.

The cheque in question was for the residue of the money alleged to be in their hands, and was drawn a few days afterwards. In answer to this case, the defendants proved that a bill of exchange for £42, which had been accepted by the plaintiff, payable at the defendants' bank, fell due on the 20th of March, and was on that day presented to the defendants, and by them paid to Messrs. Spooner and Co., who held it. In order to meet this defence, the plaintiff proposed to show that no orders had been given by the plaintiff to the defendants to pay the bill of exchange, and that, in fact, he did not intend it to be paid, as the drawer had become bankrupt; that on the 20th of March, after the bill had been paid, a clerk of the defendants called on the plaintiff and inquired what was to be done about the acceptance, not

saying that it had been already paid; that the plaintiff desired that it should not be honoured; whereupon the clerk went to Messrs. Spooner's with the view of getting the money back, but failed to do so. The acceptance was marked as having been paid, and cancelled by mistake.

It was contended, under these circumstances, that the defendants had paid the acceptance for the £42 in their own wrong, and that the subsequent payment of the cheque operated as an admission that they had assets of the plaintiff in their hands on the 25th of March, and so that the bill had been paid without authority. The learned judge held, that whatever occurred after the payment of the acceptance was immaterial, as that payment must be taken to have been made by the plaintiff's authority, whether, so far as concerned the defendants themselves, they had paid it rightly or wrongly, and so that the assets were exhausted and this action answered. The jury accordingly returned a verdict for the defendants.

Crowder having moved for a rule calling upon the defendants to show cause why there should not be a new trial, on the ground of misdirection, the Court said—"This was an action against the defendants, who are bankers, for not honouring the plaintiff's cheque for £7. 11*s*., the plaintiff alleging that they had funds in their hands. It appeared that, on the 20th of March, the balance in the plaintiff's favour was £21. 4*s*. On that day an acceptance of the plaintiff, made payable by

him at the defendant's for £42, was presented and paid. The cheque in question was presented about a week afterwards. The plaintiff was prepared to prove that on the 20th, after the acceptance had been paid, a clerk of the defendants called on him to know what should be done about that acceptance, not stating that it had been paid: that the plaintiff directed that it should not be paid; that the clerk endeavoured to get the money back from the persons to whom it had been paid, marking the acceptance as paid and cancelled by mistake, but they refused to refund: and that the defendants had afterwards, on the 25th of March, honoured a cheque drawn by the plaintiff for £13. 13s., and so the plaintiff contended that the defendants had paid the acceptance for £42 in their own wrong, as appeared by their own conduct, and had still funds in hand sufficient to pay the cheque in question for £7. 11s. The learned judge held that these facts, if proved, would make no difference; that the defendants had authority from the plaintiff to apply his money towards the payment of the acceptance, and so had properly applied and exhausted his funds, and that what happened afterwards was immaterial. We think he was right in so holding. The plaintiff, by making the acceptance payable at the defendants, clearly authorized them to pay it; and if the balance in his favour had been £42 on the 20th of March, they would have been bound to pay it, unless the plaintiff, before it was pre-

sented, had countermanded that authority. They were not, indeed, bound to pay it under the existing circumstances, because they had not sufficient funds; but they were fully authorized to apply what funds of the plaintiff they had towards the payment. Whether they could recover from the plaintiff the additional sum which they advanced to make up the £42 (which was necessary to be advanced, since the holders would probably not have taken part only; nor is it customary to offer a part payment), it is not necessary for us to determine. That question might depend on the course of their dealings, and other circumstances which are not before us. It is sufficient for the present purpose to say, that we are clearly of opinion that the defendants had authority to apply what funds of the plaintiff they had towards the payment of the £42 acceptance; and that if the plaintiff intended them to dishonour that acceptance, he should have given them notice to do so. What took place after they had paid the acceptance, however ill advised on their part, could not alter or destroy the pre-existing authority. We are, therefore, of opinion that there was no misdirection in this case, and the rule for a *new trial must be refused*."

3. *Duty of a banker as to the payment of cheques, when an account is opened by more than one person, not being partners in trade.*

When an account is opened by several persons,

it appears always to have been the practice of bankers to require the signature of all those persons to the cheques that are used to draw out any of the money. Thus, part of a bankrupt's estate was paid into the Bank of England in the names of five assignees. One of the assignees died, and another went abroad and the remaining assignees applied to the Bank to draw out the money, but the Bank refused to pay them; and it became necessary to apply to the Lord Chancellor for an order, which on being granted, was of course a sufficient indemnity to the Bank: *Ex parte Collins* (2 Cox. 427). Again, in the case of *Ex parte Hunter* (2 Rose, 363), the petitioners and Fidgeon, as the assignees under a bankruptcy, opened an account with the Bank of England, and paid in the proceeds of the estate as they were realized. Fidgeon absconded, and was declared bankrupt, but did not surrender. A dividend having been ordered, the petitioners drew upon the Bank, who refused to pay the drafts without the additional signature of Fidgeon. The petition prayed that the Bank of England might be directed to pay cheques signed by the petitioners only, to the extent of the bankrupt's property there deposited, and the Lord Chancellor made the order.

The foregoing cases show what is the practice of bankers; but they do not go to the extent of proving that bankers would incur any liability by paying such cheques. It is now, however, clearly settled that bankers are not justified in paying

cheques drawn by one of several persons having an account, and not being partners.

In *Stone* v. *Marsh* (Ryan and Moody, 369), the Court said—"If two persons give a power of attorney to bankers to sell out their joint stock, the bankers ought to place the proceeds to their joint account, and both ought to draw."

In *Innes* v. *Stephenson* (1 Moody and Robinson, 145), it was contended that bankers had a right to pay cheques drawn by one assignee in the absence of the others; but Lord *Tenterden* said—"That the case was a very clear one, that money was paid to the bankers by three persons, not partners in trade; that it had been stated that one of them could draw cheques so as to bind the others: but that was not the law, and to allow it would defeat the very object of paying it in jointly; and it must be well known to the jury that it was not the practice, unless the persons drawing stood in the relation of partners."

This principle was laid down in *Dixon's Case* (2 Lewin's Crown Cases, 178) by Mr. J. *Patteson*, who said—"Here the bankers, being authorized to pay the money to three persons in particular, and to them only, pay it to one of those persons and to two who are strangers to the transaction, and that without any authority, genuine or colourable, from the real parties." And, accordingly, the bankers were held to be the parties who had been defrauded by the forgery there committed, inasmuch as they were liable for the money they had

so paid on the genuine authority of one person only out of three persons.

In the late case of *Slowman* v. *Bank of England* (9 Jurist, 243), an elaborate attempt was made by the Bank of England to break in upon this principle, so far as related to joint holders of stock. There a sum of stock was standing in the names of two trustees, and one of them forged the name of the other, and sold out the stock. The parties beneficially interested filed a bill in Chancery to recover the stock; and one of the points taken by the Bank to defeat the bill was, that the transfer by the one trustee had the effect of severing the joint tenancy, and leaving the other trustee legal owner of a moiety. But the Court said—"The absolute nonsense of that is apparent from this, that if it be so, and if the right of the joint tenant is to transfer a moiety, put the case that £1,000 stock stands in the names of A. and B. jointly, then A. transfers a moiety. What is the consequence? £500 appears to remain in the names of A. and B.—A. has still a right to transfer a moiety; and so he may go on, transferring moiety after moiety of every remaining sum, until, as the expression is, the remainder will be less than any assignable quantity. Virtually he will have the power to transfer the whole; and then that will be the result of the doctrine, that a joint tenant has himself the right to make a transfer of the moiety. And it would be quite impossible for the Bank of England to be always keeping a sort of check account against

the right of a particular individual, whose name stands with others, to transfer only a certain portion up to his limited right by law, in the mere view of a joint tenancy. And it appears to me to be palpable, on the plain language of the Act of Parliament, that the transfers were to be made by the parties in whose names the stock stood which was to be made the subject of transfer or assignment. Then, in this particular case, the very view of the law which I take was, in fact, bowed to by the Bank of England, for no transfer was made except on the production of that which was apparently on the face of it, an authority of two."

These remarks of the Vice-Chancellor show that the Bank would have been the first to lament the success of the argument in this particular case. The law on this subject is not peculiar to the case of money deposited with a banker by several parties, and then drawn out by one of them, or to stock, as just stated; the same rule applies to other things. Thus, if an article be deposited by one with the authority of another, and received by the bailee to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to sustain trover upon the bailee's refusal to deliver it: *May* v. *Harvey* (13 East, 197). See also *Regina* v. *Turpin* (2 Car. and K., 820), and *Attwood* v. *Ernest* (22 L. J. (C. P.) 225).

4. *As to payment of cheques by banker after notice of an act of bankruptcy by drawer.*

Bankers having notice of an act of bankruptcy committed by a customer, cashed cheques drawn on them by him in favour of creditors. A fiat was issued against him founded on a subsequent act of bankruptcy. It was held that the bankers could not prove under the fiat for the amount paid by them on such cheques. The Court said—"This is the case of a banker who has knowledge of an act of bankruptcy, on which a fiat may never be issued. It is a very difficult position for him to be placed in; he must either issue or cause to be issued a fiat, or refuse the cheque; for, in effect, the judgment of the court of law on these actions is, that if he pays the cheque the money may be recovered from him by the assignees": *Ex parte Sharpe* (3 Montague, Deacon, and De Gex, 490, 8 Jurist, 1012). See *Vernon* v. *Hankey* (2 T.R. 113), and *Abbott* v. *Pomfret* (1 Hodges, 24).

5. *If the drawer of a cheque cancels or destroys it, and it is afterwards fraudulently obtained and presented, the banker ought not to pay it, and will be responsible if he should pay it.*

In the case of *Scholey* v. *Ramsbottom*, the defendants were bankers, with whom the plaintiff kept cash. It was an action to recover the balance of his account; and the only question was, whether

defendants were entitled to take credit for a sum of £366. On Wednesday, the 20th September, 1809, the plaintiff being indebted to Messrs. Miller and Co., drew a cheque in their favour in the following form :—

"Messrs. Ramsbottom, Newman, Ramsbottom and Co.

"London, September 20th, 1809.

"Pay Messrs. Miller and Co., or bearer, three hundred and sixty-six pounds.

"£366. "ROBERT SCHOLEY."

But finding that the sum was incorrect, he tore the cheque into four pieces, which he threw from him, and drew another cheque in the same form for £360. The latter was presented for payment and paid by the defendants the same day. On Monday, the 25th of September, the first cheque was likewise presented for payment by a person unknown. The four pieces into which it had been torn were then neatly pasted together upon another slip of paper; but the rents were quite visible, and the face of the cheque was soiled and dirty. The defendant's clerk paid it, however, without making any inquiries.

Lord *Ellenborough* was of opinion that, under these circumstances, bankers were not justified in paying the cheque; and the jury found a verdict for the plaintiff for £366: *Scholey* v. *Ramsbottom* (2 Campbell, 485).

6. *If the drawer's signature be forged, or the amount of the cheque be fraudulently altered after it has been properly filled up by the drawer, the banker ought not to pay it.*

In the following case the plaintiffs were merchants in the city of London, having, at the time of the transaction in question, an account with the defendants as bankers. On the 25th or 26th of August, 1823, Mr. S. Hill applied to J. Hall, one of the plaintiffs, for the loan of a cheque of £3, stating at the time it was for a friend to send into the country; upon which Mr. Hall drew and delivered to S. Hill the cheque upon the defendants, using for that purpose one of the printed forms with which the defendants supply their customers. The sum for which this cheque was drawn was written by Hall in words at length in the body of the cheque, and also in figures, the latter being in the same line with his signature. Mr. Hill had been induced to apply for the loan of the cheque by one Wagstaff, who had applied to him for such a cheque; and Hill, having obtained it, handed it over to Wagstaff. Wagstaff expunged the dates, the figures, and the words three pounds, and also the figures £3. 0*s.* 0*d.*, and substituted the words two hundred pounds, and £200 in figures, but in such a manner that no one, in the ordinary course of business, could have observed it. The cheque, so altered, was presented by, or on account of, Wagstaff to the defendants

for payment on the 20th of August, on which day the balance in their hands, on account of the plaintiffs, was only £183. 15*s.* 5*d.* The defendants paid the amount of the cheque as altered; and having, a day or two afterwards, received funds to cover the amount overpaid on the 29th of August, they claimed to retain the whole sum of £200 on account of the cheque drawn and paid under the foregoing circumstances.

Abbott, C.J. (afterwards Lord Tenterden) said—"I am of opinion that the plaintiffs are entitled to recover. Bankers can only charge their customers with sums of money paid pursuant to order. Here, unfortunately, the bankers have paid more than the order authorized them to do, for by that they were directed to pay no more than £3. I have no doubt the bankers cannot charge their customer beyond that sum. The plaintiffs are, therefore, entitled to the judgment of the Court for the excess."

Bayley, J.—"The banker, as the depositary of the customer's money, is bound to pay, from time to time, such sums as the latter may order. If, unfortunately, he pays money belonging to the customer upon an order which is not genuine, he must suffer; and, to justify the payment, he must show that the order is genuine, not in signature only but in every respect. This was not a genuine order, for the customer never ordered the payment of the money mentioned in the cheque": *Hall and Another* v. *Fuller and Others* (8 Dowling and Ryland, 464).

As regards the position stated by Mr. Justice Bayley above, that the banker must show the order was genuine, not in signature only, but in every respect, it appears to us to lay the principle down too broadly. Thus, where a party receives a blank cheque signed, with directions to fill in a certain amount, and to appropriate the instrument to a certain purpose, and he fraudulently fills in a different amount, and devotes the cheque to other purposes, he commits forgery: *Reg.* v. *Bateman* (1 Cox's Crim. Cases, 186), *Flower* v. *Shaw* (2 Car. and K., 703), and *Reg.* v. *Wilson* (17 L. J. (M.C.) 82). But a banker who paid such a cheque, would clearly be warranted in so doing, because the signature is genuine; and no attention could possibly discover whether the cheque had been filled up before or after the signature, or in conformity or not with the instructions given by the drawer: see the case of *Young* v. *Grote* (4 Bingham's Reports, 253). Where the indorsement of the name of the payee of a bill of exchange, made payable at a banker's, was forged, and the bankers paid it, they were held to be responsible to the acceptor, although the acceptance was genuine, and was placed on the bill after the forgery of the indorsement: *Tucker* v. *Robarts* (18 L. J. (Q.B.) 159). Same case in error, 20 L. J. (Q.B.) 270.

7. *Right of bankers who pay a forgery to recover back the amount from the party receiving it.*

We shall give the leading cases on this point at length. *Fuller* v. *Smith* (1 Ryan and Moody, 49) was an action to recover the amount of a bill of exchange which had been discounted by the plaintiffs for the defendants, and which afterwards turned out to be a forgery. The bill purported to be drawn by a person named Lunn, and accepted by George Norman and Son, payable at the plaintiff's who were their bankers, and indorsed by Lunn and one Robert Simpson. The forgery was clearly proved. For the defendants their clerk was examined, who swore that the defendants were the agents of Simpson, and had paid over the money to him before they had any notice of the forgery; but on his cross-examination he admitted that there was a running account between the defendants and Simpson, and entries in the books on both sides. These books were not produced.

The *Attorney-General* for the defendants—"The defendants in this case are entitled to a verdict. It appears, from the evidence of their witness, that they were only the agents of Simpson, and had paid over the money to him before they had notice of the forgery; and if an agent pays over money to his principal, he cannot be called on to refund. In this case, also, it appears that the plaintiffs are the bankers of the acceptors as

well as the discounters of the bill, and bankers are bound to know the handwriting of their customers. If there was any negligence, it was on the part of the plaintiffs."

Scarlett, for the plaintiffs—"I doubt whether Simpson was indebted to the defendants at all, because the books are not produced. But it makes no difference whether the defendants were acting as agents or not; the contract is with them, and there is a warranty on their part. It matters not whether the subject of the action be a bill of exchange or anything else. Suppose a man sold another a hamper as a hamper of wine, and it turned out to be a hamper of water, he could not, on being called on to return the money, say I sold it for a principal, you must run after him. There is no defence to the action."

Abbott, C.J.—"The only question of fact in this case is, whether the defendants paid over the money to Simpson before they had notice of the forgery; but I am of opinion, in point of law, that they are liable whether they did so or not. With respect to the argument that the plaintiffs ought to have known the handwriting of the acceptors, I am of opinion that a banker is bound to know the handwriting of those who draw on him, as far as regards paying bills so drawn; but not when discounting a bill, for his attention is not called to it then. My opinion therefore is, that the plaintiffs in this case are entitled to a verdict." His Lordship then requested the jury to say whether

they were satisfied of the fact of the money having been paid over before notice of the forgery.

The jury stated that they were not satisfied. —Verdict for the plaintiffs.

But if a *bonâ fide* holder of a forged cheque receive the amount of it from the banker, and retain it without notice for a whole day, the banker cannot recover back the amount. This question was discussed in the case of *Cocks* v. *Masterman* (9 Barnewall and Cresswell's Reports, 902).

At the trial of this case before Lord Tenterden, C.J., at the London sittings after Michaelmas Term, 1827, a special verdict was found stating in substance as follows:—Long before and at the several times hereinafter mentioned, the plaintiffs carried on business as bankers, at Charing Cross, in the city of Westminster, and the defendants carried on business as bankers in Nicholas Lane, in the city of London. Before and on and after the 24th of May, 1827, certain persons carrying on trade and business under the firm and style of "Sewell & Cross," kept an account and cash with the plaintiffs as their bankers; and certain other persons carrying on trade and business under the firm and style of "Sanderson & Co.," kept an account and cash with the defendants as their bankers; and before the said 24th of May, a bill of exchange, drawn by one T. Dutton upon Sewell & Cross, bearing date the 21st of March, 1827, for £198. 19*s*., payable two months after date to the order of T. Dutton, and indorsed by the said

T. Dutton, and also by C. Heginbotham and one J. Harris, and purporting to be accepted by Sewell & Cross, payable at the plaintiffs, was paid to the defendants by Sanderson & Co. to their credit with the defendants; and upon the said 24th of May, the defendants presented the said bill to the plaintiffs, and required them to pay the same according to the said acceptance; and that the plaintiffs, believing the said acceptance to be that of Sewell & Cross, paid to the defendants the sum of £198. 19*s*., as the amount of the bill of exchange so purporting to be accepted as aforesaid; that on the 25th day of May (being the day next following the day on which such payment was made), the plaintiffs discovered that the acceptance on the bill was not the acceptance of Sewell & Cross, but that the same was forged by T. Dutton, the drawer of such bill; that the said acceptance was, in fact, so forged; and that on the said 25th of May, about 1 o'clock, the plaintiffs gave notice to the defendants and to J. Harris the indorser, and to Sanderson & Co., that the same was forged, and that the said payment had been made by them under a mistake, and in ignorance of the acceptance being so forged; and they requested the defendants to repay them the said sum of £198. 19*s*. And on the same day one Thomas Gates, as attorney for the "Bankers' Society for Protection against Forgers," and of which society the plaintiffs and defendants were members, sent the following letter to C. Hegin-

botham the other indorser, and also a like one to J. Harris:—

"Sir,—A bill of exchange, bearing your indorsement, for £198. 19*s*., drawn by Thomas Dutton, and purporting to be accepted by Sewell & Cross, and indorsed by you to J. Harris, due yesterday, has been refused payment, and now lies with me, the acceptance being forged; and if the same is not taken up by 10 o'clock to-morrow, legal proceedings will be taken against all parties."

The sum of £198. 19*s*. was entered by the plaintiffs in the day-book, to the debit of Sewell and Cross, but was not carried into the ledger, or further charged to their account. Sanderson & Co. did not draw out of the hands of the defendants any sum of money upon the credit of, or in respect of, the said bill; and the balance of moneys belonging to Sanderson & Co. in the hands of the defendants, as their bankers, both before and at and after the several days before mentioned, greatly exceeded the said sum of £198. 19*s*.

The case was now argued by *Richards* for the plaintiffs:—The money in this case was paid by the plaintiffs to the defendants without consideration, and under a mistake as to the facts; it may therefore be recovered back in this action.

On the other side, the cases of *Price* v. *Neal* (1 W. Blackstone, 390, 3 Burrows, 1354), and *Smith* v. *Mercer* (6 Taunt. 76), will be relied on.

On the other hand, *Jones* v. *Ryde* (5 Taunt. 488), and *Bruce* v. *Bruce* (5 Taunt. 495, 1 Marshall, 155), are in point for the present plaintiffs.

Nothing was done in this case that could prejudice any of the parties; when the forgery was discovered the holder of the bill had not drawn out any of the money from the hands of the defendants, and none of the prior parties to the bill were discharged by *laches*. Unless, then, it be held, that if the forgery had been discovered immediately after the payment, the money could not have been recovered back, the present plaintiffs must be entitled to recover in this action.

Pollock, on the other hand, argued that—"The defendants were entitled to retain the money which they had received for their customer. The case presents two conflicting principles: first, that money paid under a mistake may be recovered back; secondly, that the acceptance or payment of a bill cannot be revoked. And the question is, by which of these principles the present case is to be governed? The first has been applied with this limitation, that where the party paying has knowledge of all the facts, or the means of knowledge, he cannot recover back the money paid. Here the plaintiffs had the means of knowing their customer's handwriting—it was their duty to know it; and, therefore, they cannot recover back the money on the ground that they paid it under a mistaken supposition that the bill

was accepted by their customer. If, indeed, the mistake had been discovered immediately, the transaction might have been undone, for then no new circumstances varying the situation of the parties could have intervened. Here a whole day intervened; new circumstances might have arisen; and the Court will not inquire whether they did or not. *Smith* v. *Mercer* is directly in point for the defendants; and *Wilkinson* v. *Johnson*, cited for the plaintiffs, differs, for there the mistake was discovered on the same morning when the payment was made."

Bayley, J., delivered the judgment of the Court in the following terms—"This was an action brought by Cocks & Co., bankers in London, to recover a sum of money paid by them to the defendants, on the ground that they, having paid the money by mistake, and in ignorance of the facts, were entitled to recover it back. The bill was presented the 24th of May, the day on which it became due. The plaintiffs paid it, not knowing that it was not the genuine acceptance of Sewell & Cross. On the following day it was discovered that the acceptance was a forgery; and the plaintiffs on that day gave notice to the defendants. It was insisted that the plaintiffs were not entitled to recover, because they, being bankers, ought, before they paid the bill, to have satisfied themselves that the acceptance was genuine. On the other hand, it was said that the plaintiffs, having given notice of the forgery

to the defendants on the day next after the bill had been paid, were entitled to recover back the money, on the ground that they had paid the money under a mistaken supposition that the acceptance was the genuine acceptance of Sewell & Cross; and the case of *Wilkinson* v. *Johnson* was relied on. That case differs from the present in one material point—viz., that the notice of forgery was given on the very day when payment was made, and so as to enable the defendant to send notice of the dishonour to the prior parties on that day. In this case we give no opinion upon the point whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendant on the very day on which the bill was paid, so as to enable the defendant on that day to have sent notice to other parties on the bill; but we are all of opinion that the holder of a bill is entitled to know, on the day when it becomes due, whether it is an honoured or dishonoured bill; and that if he *receive the money, and is suffered to retain it during the whole of that day*, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dis-honoured by the acceptor) to take any steps against the other parties to the bill till the day after it is dishonoured: but he is entitled so to do if he thinks fit; and the parties who pay the bill ought not, by their negligence, to deprive the holder of any right or privilege. If we were to hold that the plaintiffs were entitled

to recover, it would be in effect saying that the plaintiffs might deprive the holder of a bill of his right to take steps against the parties to the bill on the day when it becomes due."

It will be seen that the foregoing was an ordinary bill of exchange; but there is no distinction, in this respect, between it and a cheque. The drawer of a cheque is analogous to the acceptor of a bill of exchange payable at a banker's; and the holder of a cheque is also analogous to the indorsee or holder of a bill.

8. *Where bankers allow their customers the amount of a cheque under a representation that it is a forgery, they may, upon discovering that it was genuine, recover back the amount.*

In the case of *Williams and Others* v. *Woodward*, plaintiffs, who were bankers, had paid a cheque of the defendant's, and afterwards allowed him in account on a suggestion that the cheque was a forgery. On the part of the plaintiffs one of their cashiers was called, who swore that he believed the signature to the cheque in question to be the defendant's handwriting; and he further stated, that on Monday, the 5th of November (the cheque having been paid on Saturday, the 3rd), the defendant came to the banking-house and stated that the signature was not his, and offered to make oath of the fact. On his cross-examination he said that the plaintiffs supplied their customers

with printed forms of cheques, and that the latter generally drew on them by such cheques; and that, by a printed notice, they specially desired that their customers would use them, but that, notwithstanding, it was their practice to pay written cheques, if they thought the signature genuine. It further appeared that the defendant had represented to the bankers that the cheque had been written on a piece of paper containing his signature, which was lying in his office, by a person named Jones, who was his clerk.

This last representation was made after Jones had been taken into custody on a charge of having forged the cheque. In consequence of what the defendant said on the Monday to the bankers, they caused the following entry to be made on the credit side of his account in their books:— "November 5th, 1827. Charles Woodward, by Williams & Co., for forged cheque £154." The defendant was the secretary to one of the London Gas Companies, of which one of the plaintiffs was the treasurer, and Jones was in the constant habit of going backward and forward from the defendant to the banking-house on the business of the company. The bankers' clerk who was examined, was not able to mention any instances in which the plaintiff had sent cheques not in the printed form.

The clerk who paid the cheque was examined before the grand jury on an indictment for forgery against Jones, but had since become insane, and

could not therefore be examined at the trial. The defendant also went before the grand jury. The bill was returned by them "Not found."

Tindal, C.J., in summing up, said—"This is an action brought to recover a sum of £154, which the plaintiffs say they have paid under a mistake. In point of fact, the question is, whether, upon the evidence, they are at liberty to claim that money again, and that will depend upon whether the instrument was genuine or not; for if it was genuine, and they found it out afterwards, they might rescind the payment. The burthen of proof is on the plaintiffs. It is for them to show, in this case, that the instrument was genuine. An instrument is as much a forgery if the name has an order for payment written over it, without any intention in the signer that the signature should authenticate the instrument, as if the whole is forged. There is no positive affirmative evidence that the defendant had ever authorized Jones to draw cheques for him."

The jury found a verdict for the plaintiffs, but said that, in their opinion, there was not any imputation on the character of the defendant. *Williams and Others* v. *Woodward* (4 Carrington and Payne, 346).

9. *A banker who pays a cheque without funds, cannot legally receive the amount from his customer after the latter has committed an act of bankruptcy.*

A bankrupt had, by his acceptance of a bill of £300, made it payable at the house of the defendants, who were his bankers; it fell due on the 8th of August, a Saturday, and on that day was presented to them and they paid it, having at that time, as it afterwards appeared upon a statement of the bankrupt's banking account, a balance of £54 only in their hands. The bankrupt, on the morning of Monday, the 10th, as soon as the defendant's shop was open, paid them £250 to the credit of his account there. He had committed an act of bankruptcy on the preceding Wednesday, the 5th of August, and a docket was struck against him on the 8th, on which a commission issued on the 17th. The defendants, when they received the money, had no knowledge of Halls (the bankrupt) having committed an act of bankruptcy. The assignees sued the bankers to recover what the bankrupt had so paid. The jury found a verdict for the plaintiffs, thereby deciding that the banker could not retain the £250.

Shepherd (Solicitor-General), moved the Court to set aside the verdict and enter a nonsuit, contending that the payment of the £250 was protected by the statute 19 Geo. 2, c. 32, sec. 1; for that the defendants were creditors in respect

of a bill drawn by the bankrupt, namely, his direction to them to pay his acceptance. If he had drawn a draft upon the defendants, and they had paid it, that would have been a thing upon which they could have maintained an action against him, and this direction to pay his acceptance was equivalent to it.

Gibbs, C.J., said — "If this, instead of an acceptance made by the bankrupt payable at the defendants, had been a draft drawn upon them, it would not even then have been within the statute; the statute contemplates bills accepted by the bankrupt in respect of which debts arise to the creditor. If a man draws a bill on another, who pays it, the drawee cannot afterwards bring an action against the drawer thereupon, as if he was the bearer of the bill. He does not take the bill as an indorsee, he discharges the bill. It has been held at law that if one of two obligors discharges a bond, he cannot set it up and recover on it against the other. Here the bankrupt desires, by an order written on the bill, the defendants, as his agents, will pay the bill. The defendants never became indorsers or holders of the bill; the case is the same as if the bankrupt had written a letter to the defendants, desiring them to pay a sum of money; when they have done it, there is an end of the letter, it is not transferred to them as a negotiated instrument. This is not within the words of the Act, which are, 'A person who shall be really and *bonâ fide* a

creditor of the bankrupt, for or in respect of any bill or bills of exchange really and *bonâ fide* drawn, negotiated, or accepted by such bankrupt.'"

Chambre, J.—"This is merely a loan of money. The Act is confined to two cases—first, where the money may be recovered in an action for goods sold and delivered; and secondly, where an action may be brought against the bankrupt upon bills. This is neither of those cases; it is merely the case that the bankrupt, finding his account overdrawn, and thinking it a hard case on the bankers, sends them this sum." Rule refused. *Holroyd and Others* v. *Whitehead and Others* (3 Campbell, 350).

The foregoing case is qualified by the recent statutes relating to dealings with and payments to or by bankrupts. But these statutes do not sanction a fraudulent preference, and therefore the case may still be law to a considerable extent. The payment to the bankers was made without any pressure by them, and might be deemed a fraudulent preference.

10. *Bankers may, by their conduct, render themselves liable to pay a cheque, although they have a large balance due to them by the drawer.*

In *Kilsby* v. *Williams* (5 Barnewall and Alderson, 815), Williams and Co., the bankers, received a cheque on the 13th of November, from a customer named Kilsby, for £250, which was drawn by another customer named Robertson, who owed

them a considerable balance. The drawer of the cheque paid in a sum of money on the same day, which he expressly appropriated to the charges of the day. After paying these charges there was a balance left of £237 out of the sum so paid in. Two cheques, drawn by Robertson, were presented for payment after the cheque for £250, and were paid. On the 14th of November the bankers wrote to Kilsby, and said the cheque for £250 was not paid, and they would keep it in the hope of there being money to pay it; and they promised Robertson also to pay it when they had funds. On the 14th Robertson paid in money, which, added to the £237, was sufficient to pay the cheque. On the 15th of November Robertson failed. The Court held that the bankers were bound to pay Kilsby, although there was a large balance due to them from Robertson; and the judgment seems to have rested on the conduct of the bankers.

Abbott, C.J., said—"He thought, under the circumstances, the defendants (the bankers) were liable to pay the cheque in question, in preference to the two of £50 each, and to their own balance."

11. *Where the drawer and the holder of a cheque employ the same bankers, the latter are not bound to inform the holder that the drawer has no funds, unless the question be asked, and they will not be responsible if they retain the cheque for a day after it has been presented.*

The consequences of the drawer and the holder employing the same banker, were much discussed in *Boyd* v. *Emerson* (2 Adolphus and Ellis, 184). It appeared that the plaintiff resided at Littlebourne, in Kent. Robert Matson was a corn-factor at Wingham, in the same county, and the defendants were bankers at Sandwich. On the 17th of November, 1832, Robert Matson drew a cheque on the defendants (with whom he then and for two or three years antecedently had kept an account) for £397. 11*s.* 6*d.* in favour of the plaintiff, who also kept an account with the defendants, and had for a considerable period employed Robert Matson as his corn-factor and salesman. The plaintiff had before that time received Robert Matson's cheques, drawn on the defendants. On the 17th of November, 1832, Robert Matson was indebted to the plaintiff in a somewhat larger sum than the amount stated in the cheque. On the morning of the 18th (Sunday), Robert Matson delivered to the plaintiff the cheque, and on the 19th (Monday), about a quarter before 1 o'clock in the afternoon, the plaintiff took the cheque to the defendants' bank, and saw Mr. Reader, their

cashier and confidential clerk of the establishment, and gave him directions to provide for the payment of a bill made payable at their correspondents in London (Glynn & Co.) for £75, in the following month. A memorandum of the request was made at the time by Mr. Reader. While Mr. Reader was making a memorandum of this request, the plaintiff, laying the cheque for £397. 11*s.* 6*d.* on the counter, said "Place this to my account" or "credit." No intimation was given to the plaintiff at the time that his request to have the amount of the cheque carried to the credit of his account would or would not be complied with, or that Matson had overdrawn his account. Mr. Reader knew, at the time the cheque was presented, that Robert Matson was indebted to the bank upwards of £1,700, and doubted whether the cheque would be honoured by the defendants, but he knew it to be his duty, if cash was demanded for a cheque, to pay it. He also knew that Matson had frequently been permitted to overdraw his account. Mr. Reader expressly abstained, from motives of delicacy to Robert Matson, from disclosing his doubts or the state of the accounts. A few minutes after the plaintiff left the banking-house, Reader took the cheque up from the counter, but did not debit Matson with the amount, or credit plaintiff with it, or cancel the cheque. Other cheques of Robert Matson, drawn on the defendants for about £1,500, were received on the 18th from the Canterbury

banker. Mr. Hodgson (one of the firm) was away from the bank on the 18th, but returned about 5 o'clock in the afternoon of the 19th, the bank having closed at four. The fact of the receipt of the cheques was then disclosed to him by Mr. Reader.

The post leaves Sandwich at 7 o'clock in the evening, two hours subsequent to the arrival of Mr. Hodgson. It was determined that Mr. Reader should go to Wingham before breakfast the next morning (Tuesday), to ascertain from Robert Matson whether he had paid any moneys to their credit with their London correspondents. On his arrival at Wingham on Tuesday morning, Reader found that Matson was in London, but was expected to arrive at Canterbury the same day by coach, at about 10 o'clock. Mr. Reader then proceeded to Canterbury, but finding that Robert Matson did not arrive, he returned to Sandwich, where he arrived a little after 2 o'clock. Mr. Hodgson, finding that no assets had been received to discharge the large amount of cheques drawn by Matson on the house, determined not to pay any of them; and a messenger was sent by him to the Canterbury banks and to Littlebourne, returning all the other cheques to the Canterbury banks, and the cheque in question to the plaintiff, inclosed in a letter to the plaintiff, which was delivered to him at 7 o'clock on the Tuesday evening, and which was as follows:—

"My dear Sir,—On my return home last night, I found Mr. Robert Matson's cheque which you had left with Mr. Reader; but not having effects in our hands to meet it, I sent over to Wingham this morning to see him, but unluckily he was from home in London, which, for the present, constrains me to return the cheque.

(Signed) "D. Hodgson."

No previous intimation whatever had been given to the plaintiff of the defendants' resolution not to pay the cheque.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover the amount of the cheque. If so, the verdict which had been taken for the plaintiff, to stand; if not, a nonsuit to be entered. After an elaborate argument, the Court decided in favour of the defendants.

Lord *Denman*, C.J., said—"It seems to me that, according to the facts submitted for our consideration, the plaintiff has failed to prove his declaration. It is not proved that, in consideration of the plaintiffs delivering up the cheque to the defendants, they promised to pay the amount thereof. What passed when the bill was left was equivocal; for it appears, that while Mr. Reader was making a memorandum, the plaintiff, laying the cheque on the counter, says, 'Place this to my account or credit.' No intimation was given to the plaintiff, at the time, that his request would

not be complied with. It seems to me, that if he had presented the cheque for payment, or had told Reader to put the amount to his credit, and Reader had assented to that, there might be ground for this action; but, according to the facts of this case, the plaintiff took this bill and paid it into his bankers, subject to every rule and liability that other bills are. Instead of notice of dishonour, therefore, coming too late, it came to the plaintiff sooner than there was any occasion for; it having been held, *that by usage, a banker receiving a cheque on one day is not bound to present it for payment till the following day, and that the plaintiff's being a customer of the defendants made no difference.* [Note. But see as to city bankers, *Brooker* v. *R. B. B.* (Bankers' Mag., vol. xi., p. 362).] *Kilsby* v. *Williams* (5 Barnewall and Alderson, 815). So that there is no ground of complaint against the defendants in that respect. In that last case much was said, especially by Mr. Justice Bayley, which might appear to be in favour of the argument urged for the plaintiff, that he, being a customer of the defendants, they were bound to acquaint him with the state of Matson's accounts; but it seems to me, that they must be considered as having taken it as a bill paid in by the plaintiff, and received by them as his agents, subject to the same consequences as if it had been drawn on some other banker than themselves." See also *Pollard* v. *Ogden* (22 L. J. (Q.B.) 439).

12. *Bankers may recover back money paid by them on a cheque given to a party who knew the drawer was insolvent and had no funds in their hands, provided they were ignorant of these facts.*

This appears to have been decided in the case of *Martin* v. *Morgan* (Gow. 128), where Chief Justice *Dallas* said — "The question then which may alter the case, and which possibly may be involved in some doubt, is whether the defendants, by demanding payment of the cheque, with a full knowledge that the plaintiffs (the bankers) had no funds in their hands, and under a consciousness of the probable insolvency of Burmester & Co., have a right to retain the money paid against the plaintiffs (the bankers) who made the payment under an ignorance of the real circumstances of the case. The strong inclination of my opinion is, that the plaintiffs are entitled to recover." The case afterwards came before the Court of Common Pleas, when the bankers were held to be entitled to recover.

It must be observed, however, that the cheque in question was post-dated, and therefore void; and it is not quite clear whether the Court would have considered the other facts sufficient to entitle the bankers to recover, although the language of the Court appears sufficiently strong to justify such a conclusion.

13. *Of cheques cancelled by a banker by mistake.*

By the usage of trade in London, a cheque may be retained by the banker on whom it is drawn till five in the afternoon of the day on which it is presented for payment, and then returned, although it has previously been cancelled by mistake. *Fernandez* v. *Glynn* (London sittings after M. T., 47 Geo. 3) (1 Campbell, 426). Plaintiff paid into the house of Vere & Co. a cheque upon defendant's house; Vere's clerk took it to the clearing-house to be paid, and put it into defendant's drawer. Each banker has a drawer there for that purpose. The time for putting in the cheques is from three to four. Vere's clerk received it back before five, cancelled, with a memorandum written under it "cancelled by mistake." After five he would not have taken it back. The course was proved to be for the clerks to take the cheques from the drawers, and send them to the respective bankers, and those which they will not pay they send back before five. They are sometimes cancelled when they come. By the custom, they may be returned any time before 5 o'clock. In this case several cheques of the same person had been paid on that day, and when the cheque in question was sent in, the clerk who received it immediately cancelled it, believing it was to be paid; but finding in a few minutes that no more of those cheques were to be paid, he wrote the memorandum under it, and it was returned as above stated. Lord *Ellenborough*

held that, notwithstanding the cancelling, defendant had till 5 o'clock to return the bill, and having so returned it, this amounted to a refusal to pay.

In a late case A. was the holder of a foreign bill drawn upon B., payable at the banking-house of C.; on the morning when the bill became due, D., as A.'s banker, took the bill to the clearing-house in London, and put it into C.'s drawer. C. having examined the bill, and having funds of B.'s in his hands at the time, cancelled the acceptance by drawing lines across B.'s name, without rendering the acceptance illegible. In the course of the day, B. finding himself to be insolvent, ordered C. not to pay the bill, whereupon C. wrote thereon "cancelled by mistake—orders not to pay," and the bill was returned in this state to D. at the clearing-house before the settling hour. It is the usage in the trade in London so to cancel bills intended to be paid, and where a cancellation has occurred through mistake, to indicate the same by writing on the bill. *Held* (by the Court of Common Pleas), that under these circumstances no legal liability was cast upon C., from which a promise could be inferred that he would pay the amount of the bill, or return it without having cancelled or destroyed the acceptance. That the duty cast upon C. was no more than to take due care of the bill, and if he did not choose to pay it to return it uncancelled, unless it had been cancelled by mistake, and in that case to indicate the same by

writing on the bill. That C did use due care to prevent the acceptance from being defaced. That the acceptance was an acceptance defaced and cancelled in point of fact, but that it was an acceptance cancelled by mistake. *Semble*, that a banker who omits to return or deface a bill, is not in all cases under an obligation to pay the amount. But, *semble*, if he do so wrongfully, he becomes liable to an action on the case, if the holder has sustained damage by his breach of duty. *Held*, also, that under the circumstances above stated, A could not sue C for money had and received: *Warwick* v. *Rogers* (5 Manning and Granger, 340).

14. *Death of Drawer.*

A banker is not justified in paying a cheque which is presented after the banker has received notice that the drawer is dead: Bac., Ab. "Authority, E.;" *Blades* v. *Free* (9 B. & C. 167). But, until the banker has received notice of the death, he is entitled to pay and be allowed cheques presented after the death of the drawer: *Rogerson* v. *Ladbroke* (7 Moo. 412).

15. *Of the coin in which a cheque must be paid.*

Copper is a legal tender up to two pence. Silver is a legal tender up to 40*s.*, and gold is a legal tender up to £5, and beyond £5, Bank of England notes are a legal tender, except at the Bank

of England and its branches. A banker can therefore insist upon cashing a cheque in silver, gold, and Bank of England notes, to the extent of 40*s.* in silver, £5 in gold, and the rest in Bank of England notes; and any other mode of payment is an act of accommodation by the banker. At the Bank of England and its branches their notes must be paid in gold, which comes to the same thing as if their cheques must be so paid; because, if their notes could be offered for cheques drawn on them, payment of the notes in gold could be at once required: 56 Geo. 3, c. 68, s. 11, and 3 & 4 Wm. 4, c. 98, s. 6.

16. *Of collecting cheques.*

Bankers will be liable for any loss which may result from their deviating from the usual practice in presenting and collecting, and where necessary, giving notice of the dishonour of cheques.

A London banker may be bound, as between himself and his customer, to present a cheque on another London banker on the same day that he receives it: *Boddington* v. *Schlenckner* (4 B. & A. 75), and *Alexander* v. *Burchfield* (3 Scott, 555). But, in general, he is entitled to the whole of the day after receiving it to present it.

A country banker, who receives a cheque upon a banker in another town, can either send it to that town for presentation, or send it to his London agent to pass through the clearing house, provided no delay is caused thereby: *Prideaux* v. *Criddle* (20 L. T. 695), where Lush, J., said: "If

the bank had sent the cheque to an agent at Falmouth, he would have been entitled to another day to present, therefore, sending it through the clearing house in London did not cause any delay. Again, it cannot be contended that the bank ought to have an agent in every town in the country. As to notice of dishonour, the plaintiff informed the defendant as soon as he knew of it."

A cheque upon a bank at Lewes was paid on a Friday morning into a bank at Worthing, and forwarded by the Worthing bank to London the same day, and was presented at the clearing house on Saturday and arrived at Lewes on Monday, when payment was refused; but if it had reached Lewes on Saturday it would have been paid. The Court said: "Although, in the present case, the cheque was on a country bank, and the defendants received it without advancing on it, and therefore held it for their customer, the plaintiff; still, we think these circumstances make no difference in respect of the time allowed for presentment. Lord Ellenborough says (*Rickford* v. *Ridge*), 'the rule which convenience requires must be adopted;' and he decided as above stated. That decision has been recognized and acted upon, and establishes the general rule in all cases as between the parties to a cheque; and we think the rule applies, not only as between the parties to a cheque, but as between banker and customer, unless circumstances exist from which a contract or duty on the part of the banker to present earlier, or to defer present-

ment to a later period, can be inferred. If there had been no country clearing house, the defendants, according to this rule, receiving the cheque on Friday, would be bound to send it by Saturday's post to their agent at Lewes to present, and that agent would be bound to present it not later than Monday. On Monday the cheque was presented, and so the presentment was in time." *Hare* v. *Henty* (30 L. J. (C.P.) 302). See also *Stokes* v. *Goodbody* (L. T. (1870), 141.)

All the points of delay, presentment by post and notice of dishonour, were discussed in *Bailey* v. *Bodenham* (10 L. T., 422). There a cheque was drawn and paid away on Wednesday, the 6th of May. It was retained by the payee until Friday, the 8th, a delay sufficient to fix him with loss. It was paid into his bankers on the 8th, and sent by them to London by that day's post; but inasmuch as the London agents of the drawer's bankers had ceased to act as such agents, the London agents of the holder's bankers sent the cheque by post on the 11th, direct to the country bankers upon whom it was drawn, who kept it till the 15th, when they failed, and then returned it to London. The decision was that there had been *laches* on the part of the holder, either in presenting or giving notice of dishonour, and that the drawer was discharged. Apart from the loss of one day, the 7th of May, it seems difficult to discover negligence or deviation from established usage. It was necessary to present by post. It

was no fault of the holder that the London agents of the drawer's bankers had ceased to act for them, nor was it any fault of the holder or his bankers, or their agents, that the bankers upon whom the cheque was drawn kept it four days without returning it. The Court said—"There was evidence that it was a reasonable course for one country bank to send a cheque to the London agents of another country bank for payment. But did the London bank use due diligence?" The Court thought that presentment by post was good, but if the amount were not remitted by return of post, that the cheque should be taken as dishonoured, and notice should be given forthwith.

Branch banks are, of course, held to be distinct establishments for the purposes of presentment, payment, and notice of dishonour: *Clode* v. *Bailey* (12 Mee. & W. 51), and *Woodland* v. *Fear* (26 L. J. (Q.B.) 202).

It is customary for bankers to give notice that they will not be responsible for any loss which may occur, either by delay or otherwise in the transmission of cheques; but this would not protect them from negligence, though it would render it necessary for a claimant against them to prove negligence. See *Shand* v. *Peninsular and Oriental Steam Navigation Company* (3 Moore (N.S.) 272).

17. *Of the banker's lien on cheques.*

A banker has a lien on cheques coming into his

hands in behalf of a customer who is in his debt, and the banker may sue on the same in his own name, or his assignees may sue on them: (*Scott* v. *Franklin* (15 East, 428); *Brandao* v. *Barnett* (12 Cl. and F., 787); *Jones* v. *Peppercorn* (28 L. J. (Ch.) 158), unless received under some special instructions, or with notice of some trust.

CHAPTER V.

THE STAMP.

The following are the various provisions of the "Stamp Act, 1870" (33 & 34 Vict. c. 97), affecting cheques.

Among the duties payable by the schedule to that Act is the following :—

"Bill of Exchange, payable on demand, 1*d.*"

By s. 48, "the term bill of exchange, for the purposes of this Act, includes also draft, order, cheque, and letter of credit, and any document or writing (except a bank-note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money therein mentioned."

As the term bill of exchange includes cheque, all those clauses of the Act which relate to bills of exchange will also apply to cheques where not repugnant to the character of those instruments, and these clauses seem to be the following :—

23. Except where express provision is made to the contrary, all duties are to be denoted by impressed stamps only.

24. (1.) An instrument, the duty upon which is required, or permitted by law, to be denoted by an adhesive stamp, is not to be deemed duly stamped with an adhesive stamp unless the person required by law to cancel such adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, so that the stamp may be effectually cancelled, and rendered incapable of being used for any other instrument, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time.

(2.) Every person who, being required by law to cancel an adhesive stamp, wilfully neglects or refuses duly and effectually to do so in manner aforesaid, shall forfeit the sum of ten pounds.

50. The fixed duty of one penny on a bill of exchange for the payment of money on demand may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power.

53. (1.) Where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty, and a

penalty of forty shillings if the bill or note be not then payable according to its tenor, and of ten pounds if the same be so payable.

(2.) Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof.

54. (1.) Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall forfeit the sum of ten pounds, and the person who takes or receives from any other person any such bill or note not being duly stamped either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever.

(2.) Provided that if any bill of exchange for the payment of money on demand, liable only to the duty of one penny, is presented for payment unstamped, the person to whom it is so presented may affix thereto a proper adhesive stamp, and cancel the same, as if he had been the drawer of the bill, and may, upon so doing, pay the sum in the said bill mentioned, and charge the duty in account against the person by whom the bill was drawn, or deduct such duty from the said sum, and such bill is, so far as respects the duty, to be deemed good and valid.

(3.) But the foregoing proviso is not to relieve any person from any penalty he may have incurred in relation to such bill.

The exemptions stated in the Act are as follows:—

(1.) Bill or note issued by the Governor and Company of the Bank of England or Bank of Ireland.

(2.) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.

(3.) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf.

(4.) Letter of credit granted in the United Kingdom authorizing drafts to be drawn out of the United Kingdom payable in the United Kingdom.

(5.) Draft or order drawn by the Accountant General of the Court of Chancery in England or Ireland.

(6.) Warrant or order for the payment of any annuity granted by the Commissioners for the Reduction of the National Debt, or for the payment of any dividend or any interest on any share in the Government or Parliamentary stocks or funds.

(7.) Bill drawn by the Lords Commissioners of

the Admiralty, or by any person under their authority, under the authority of any Act of Parliament upon and payable by the Accountant General of the Navy.

(8.) Bill drawn (according to a form prescribed by Her Majesty's orders by any person duly authorized to draw the same) upon and payable out of any public account for any pay or allowance of the army or other expenditure connected therewith.

(9.) Coupon or warrant for interest attached to and issued with any security.

There are also exceptions under the Acts 6 & 7 Wm. 4, c. 32; and 18 & 19 Vict. c. 73, of the drafts or orders of Friendly Societies and Benefit Building Societies.

The following cases, prior to 1870, may be referred to for decision of questions relating to cheques, and the consequences to the parties to cheques of breaches of the then existing stamp laws:—

Ex parte Bignold (1 Deac. 712); *Greene* v. *Allday* (1 Gale, 218); and *Austin* v. *Bunyard* (12 L. T., 452).

CHAPTER VI.

CROSSED CHEQUES.

The law of crossed cheques is now regulated by two short Acts of Parliament, which we shall give at length. By the 19 & 20 Vict. c. 25, it is enacted:—

"In every case where a draft on any banker, made payable to bearer, or to order, on demand, bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words 'and Company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker.

"In the construction of this Act, the word 'banker' shall include any person or persons, or corporation, or joint-stock or other company, acting as a banker or bankers."

By the 21 & 22 Vict. c. 79, it is further enacted:

"Whenever a cheque or draft on any banker, payable to bearer, or to order, on demand, shall

be issued crossed with the name of a banker, or with two transverse lines with the words 'and Company,' or any abbreviation thereof, such crossing shall be deemed a material part of the cheque or draft, and, except as hereinafter mentioned, shall not be obliterated or added to or altered by any person whomsoever after the issuing thereof; and the banker, upon whom such cheque or draft shall be drawn, shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed, or if the same be crossed as aforesaid without a banker's name, to any other than a banker.

"Whenever any such cheque or draft shall have been issued uncrossed, or shall be crossed with the words 'and Company,' or any abbreviation thereof, and without the name of any banker, any lawful holder of such cheque or draft, while the same remains so uncrossed, or crossed with the words 'and Company,' or any abbreviation thereof, without the name of any banker, may cross the same with the name of a banker; and whenever any such cheque or draft shall be uncrossed, any such lawful holder may cross the same with the words 'and Company,' or any abbreviation thereof, with or without the name of a banker; and any such crossing as in this section mentioned shall be deemed a material part of the cheque or draft, and shall not be obliterated or added to or altered by any person

whomsoever after the making thereof; and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed as last aforesaid.

"If any person shall obliterate, add to, or alter any such crossing with intent to defraud, or offer, utter, dispose of, or put off with intent to defraud, any cheque or draft on a banker, whereon such fraudulent obliteration, addition, or alteration has been made, knowing it to have been so made, such person shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or to such other punishment as is enacted and provided for those guilty of forgery of bills of exchange in the statute in that case made and provided.

"Provided always, that any banker paying a cheque or draft which does not at the time when it is presented for payment plainly appear to be or to have been crossed as aforesaid, or to have been obliterated, added to, or altered as aforesaid, shall not be in any way responsible or incur any liability, nor shall such payment be questioned by reason of such cheque having been so crossed as aforesaid, or having been so obliterated, added to, or altered as aforesaid, and of his having paid the same to a person other than a banker, or other than the banker with whose name such

cheque or draft shall have been so crossed, unless such banker shall have acted *malâ fide*, or been guilty of negligence in so paying such cheque.

"In the construction of this Act, the word 'banker' shall include any person or persons, or corporation, or joint-stock company, acting as a banker or bankers."

The foregoing statutes settle several points in the law of crossed cheques which were previously the subject of dispute and uncertainty: *Bellamy* v. *Marjoribanks* (7 Exch. R. 389); *Simmons* v. *Taylor* (4 C. B. 463). The question of presentment of crossed cheques is discussed at page 64. An attempt was made in *Carlon* v. *Ireland* (26 L. T. 195), before these Acts passed, to attach the necessity of some peculiar caution on the part of a person who cashed a crossed cheque, so as to make that person liable, if such a cheque had been obtained improperly, but the attempt failed; and, in giving judgment, Lord Campbell said—"The question is whether the cheque was taken *bonâ fide*, and for consideration, not whether it was taken with due care and after inquiry into the holder's title. Such was the old law of England. For a time there was a change, and an innovation upon that old rule, but that innovation has since been corrected by various decisions in all the courts; and the settled law now is, that the question to be considered in such cases is, whether the instrument was taken *bonâ fide* and for valuable

consideration. My ruling in this case appears most unnecessarily to have caused a great sensation in the mercantile community. It was supposed that I had altered, or attempted to alter, the law as to crossed cheques; but what I laid down was no alteration of the law. I went by the decisions of my predecessors, assuming the cheque to be still negotiable, but treating the crossing as a circumstance which must be considered by the jury in trying the question of *bonâ fides*." This case is law now. The statutes in question recognize two modes of crossing cheques. One being generally a blank to be filled in with the name of *any* banker, or without being filled in at all, to be presented by *some* banker; and the other special, or payable only through a named banker. Where the crossing is special, a banker will pay at his peril to any other banker than the named one, and therefore if several bankers' names be written across a cheque, the banker upon whom it is drawn ought not to pay it without an explanation or a guarantee. Both kinds of crossing still leave the cheque negotiable, if payable to bearer or to order, but where a special banker is named it would have to be cashed through him, and therefore would require, in ordinary practice, to be paid in for collection by some customer of that banker.

CHAPTER VII.

CHEQUES AS INSTRUMENTS OF EVIDENCE.

1. *When a cheque is evidence of the payment of a debt.*
2. *When not evidence of a loan.*
3. *When a cheque is not received as money and is not cashed, it will not operate as evidence of a payment.*
4. *On the production of a cheque in the custody of bankers.*

1. *When a cheque is evidence of the payment of a debt.*

One of the advantages which result from keeping an account with a banker, is the proof which is furnished, by means of the cheques, of the payment of the debts for which they are drawn. So much reliance is placed upon this proof, that receipts are often dispensed with when the payments are made by cheques; and any appearance of want of confidence is avoided.

Where a cheque is drawn in favour of a party, and is indorsed by him and paid, or if the cheque be not endorsed, if the receipt of it be proved by

other means, it will be evidence of payment to that party. Thus, in an action for a debt, the defence was, that the debt had been paid. To prove this, the defendant produced two drafts drawn by him on his bankers in favour of the plaintiff, and which had been paid; on one of them the name of Egg (the plaintiff) was indorsed, and on the other the name of Wilks, whom the defendant proved to be a person employed by the plaintiff to receive money for him.

Lord *Kenyon* said—"I think it evidence of payment, as the giving of the draft may be coupled with the transaction of there being dealings between the parties, though it would not of itself be evidence of a debt." *Egg* v. *Barnett* (3 Espinasse's Reports, 196).

In another case, where a cheque, signed by B, was proved to have passed through the hands of A, and to have been appropriated by him to his own purposes, it was held that the cheque was *primâ facie* evidence of payment. *Boswell* v. *Smith* (6 Carrington and Payne, 60).

In *Lloyd* v. *Sandilands* (Gow's Reports, 15), it appeared that a cheque for £2,242. 1*s*. 6*d*., drawn by the plaintiff upon her bankers, Messrs. Ransom, Morland & Co., and made payable to the defendant, had been presented at that house for payment, and that £1,300, part of it, was carried to the account of the defendant, who likewise banked there, and the residue was paid to the person who presented the cheque. There was no

evidence, however, to show that the plaintiff had given the cheque to the defendant, or in any other manner to connect him with it.

For the plaintiff it was contended, that as part of the cheque had been carried to the credit of the defendant in the bankers' books, it was *primâ facie* evidence that the defendant received the cheque from the plaintiff, and therefore required explanation.

But Mr. Justice *Dallas* said—"Although the cheque is made payable to the defendant, yet it might have been given to a third party, and, through that third person, might have got into the hands of the defendant. The plaintiff and the defendant are not by this evidence connected with the cheque. This is not proof of payment."

This case, which appears to conflict with those cases which precede it, was fully considered and explained in the following decision, which is the most recent which bears upon the subject.

In *Mountford* v. *Harper*, which was an action for money had and received, the defendant pleaded payment before action brought; at the trial before the Under-Sheriff for Staffordshire, the following facts were proved:—The defendant, who was the steward of Mrs. Offley, to whom the plaintiff was tenant, having received a sum of money, paid by the Grand Junction Railway Company, to be handed over to the plaintiff in respect of damage done to his interest as tenant, drew a cheque upon his bankers for £15 in favour of the plaintiff, which

the latter presented for payment at the bankers, and received the proceeds. There was no proof that the cheque had been given by the defendant to the plaintiff. Under these circumstances, it was objected, on behalf of the plaintiff, that sufficient proof of payment had not been produced, and that further evidence ought to have been given to connect the plaintiff with the receipt of the cheque. The Under-Sheriff was of this opinion; and under his direction the jury found a verdict for the plaintiff on the plea of payment, leave being reserved to the defendant to move to enter a verdict for him upon the issue raised on that plea.

A rule *nisi* having been accordingly obtained, Baron *Alderson* said—"I think the delivery of the proceeds of the cheque to the plaintiff was evidence of payment to him. In the judgment of *Dallas*, C.J., in *Lloyd* v. *Sandilands*, where he states that the circumstance of a cheque being made payable to the defendant, and the defendant having received payment of it, "is not proof of payment," the word "payment" is incorrectly used for "debt." That was the only case that embarrassed me, all the other authorities are clear. The rule must be absolute to enter a verdict for the defendant on the plea of payment." *Mountford* v. *Harper* (16 L. J. (Exch.) 184).

But the possession of such a cheque as the foregoing by the drawer is no evidence of a payment, if there be any doubt about the manner in which

it has come back to him. Thus, in a case where the objection relied on was the insufficiency of proof of the petitioning creditor's debt. With respect to this, it appeared that Smith, the petitioning creditor, was one of the assignees, and was consequently in the possession of all the papers of the bankrupt, and that the debt arose out of the loan by Smith to the bankrupt of a cheque for £100, drawn by Smith on his bankers, Sir Peter Pole & Co., and crossed by the bankrupt with the names of Messrs. Sykes, Snaith & Co., his bankers. The only evidence offered to show the payment of the cheque, was the fact of its being in the hands of the drawer, but no evidence was given of the manner in which it had got back into his hands. A clerk of Messrs. Sykes, Snaith & Co., merely proved that £100 were received by them from Sir Peter Pole & Co., on account of the bankrupt, the day after the date of the cheque, and a clerk of Sir Peter Pole & Co. proved that a like sum was, on that day, paid by them on account of the petitioning creditor, but neither of these witnesses could identify the cheque.

Mr. Serjeant *Vaughan* and Mr. Serjeant *Cross* contended that the fact of the cheque having found its way back to the hands of the drawer, was sufficient *primâ facie* evidence of its having been paid in due course, and consequently established the petitioning creditor's debt; particularly as the amount was proved to have been received by Messrs. Sykes, Snaith & Co. from Sir Peter

Pole & Co., Smith's bankers, on account of the bankrupt, on the day after the date of the cheque.

Best, C.J., said—"This objection, though manifestly against the justice of the case, must nevertheless prevail, there being no evidence from which the jury could legally presume the existence of the petitioning creditor's debt. The only proof to favour such a presumption was the possession of the cheque by the drawer; but as it appeared that he, as assignee, had the possession of all the bankrupt's papers, the fact of the cheque being in his hands was not alone evidence of payment. There was no proof that the cheque had actually been in the hands of Messrs. Sykes, Snaith & Co., neither was there any proof that this cheque had been paid to them by Sir Peter Pole & Co. In order to identify it, and make it evidence of the existence of the supposed debt, the clerk who paid it should have been called to prove the fact of payment." *Bleasby* v. *Crossley* (11 Moore's Reports, 327).

2. *A cheque is no evidence of a loan from the drawer to the payee.*

This has been already stated incidentally in some of the foregoing judgments. The following case is expressly in point. It was an action brought by the plaintiffs as executors, for money lent to the defendant by the testator in his lifetime. The testator had died in the year 1798.

It was proved that in his lifetime he had kept cash at the house of Wright & Co., who were bankers, and who had also been bankers to the defendant since the testator's death; so that the person of the defendant was well known at the banking-house, to the clerks employed there. To establish the loan of the money by the testator to the defendant, the plaintiff then produced a draft drawn by Greatorex, the testator, in his lifetime, on Wright & Co., his bankers, in the month of February, 1797, payable to the defendant; and it was proved by a clerk in the banking-house that that draft had been paid to Gerrish, the defendant, out of the money of the testator at that time in their hands.

Lord *Kenyon* said—"This is no evidence to establish a debt; no evidence is offered of the circumstances under which the draft was given: in might be in payment of a debt due by the testator, or the defendant might have given cash for it at the time. From the circumstance of the defendant's name being used in the body of the draft, no inference can be drawn; it is perfectly arbitrary what name is used in drawing a draft on a banker, a man uses the name which first occurs to him. If the plaintiff had shown any money transactions between the defendant and the testator, from whence a loan could be inferred, or any application by the defendant to borrow money at the time, that, coupled with the giving of the draft, might be evidence to go to the jury; but,

standing a naked transaction as it does, it is not evidence; and the plaintiff must be nonsuited." *Cary et alt, Executors of Greatorex* v. *Gerrish* (4 Espinasse's Reports, 9).

The following case was decided on the same principle. It was an action for money had and received, brought to recover back the premiums paid upon policies. The defendants gave notice of set-off, and proved on the trial numerous cheques drawn by the defendants on the bankers, and delivered to the plaintiff, to whom the bankers had paid them. It appeared that there had been transactions between these parties to a very large amount. The plaintiffs objected, that it was necessary to show on what consideration, or for what purpose, these cheques were delivered, in order to apply them to this set-off; and that they did not prove any payment without evidence of the circumstances under which they were given. A verdict passed for the plaintiff, and a rule *nisi* had in the last term been obtained to set it aside.

Serjeants *Shepherd*, and *Best*, would now have supported the rule, but the Court interposed.

Sir *James Mansfield*, C.J.—"I am sure I remember a case before Lord Mansfield, C.J., in which a cheque given was produced as evidence *of a debt*, and his lordship held that that alone was not sufficient."

Chambre, J.—"All our accounts would be in inextricable confusion, if such evidence were allowed." Rule discharged. *Aubert* v. *Walsh*

(4 Taunton, 293): see also, *Graham* v. *Cox* (2 Car. and K. 702): *Welch* v. *Seaborn* (1 Stark. 474).

3. *Where the cheque is not received as money, and is not cashed, it will not operate as evidence of a payment.*

Thus, in the case of *Hough* v. *May*, it appeared that the plaintiff's account amounted to £8. 18*s*., and that several applications had been made to the defendant for payment. On the 7th of November the defendant sent a cheque in the following form to the plaintiffs:—

"7th November, 1835.

"Messrs. Dorein and Co.—Pay Messrs. Hough and Co., balance account railing, or bearer, £8. 11*s*.

"£8. 11*s*. "WILLIAM MAY."

On the 13th the plaintiff's attorney wrote a letter to the defendant, informing him that the cheque was lying at his office uncashed, and the defendant might have it back. The Under-Sheriff left it to the jury to say whether the cheque was received as payment of £8. 11*s*.

The jury found their verdict for the plaintiffs for £8. 18*s*., saying that the cheque was not received as money; and leave was reserved for the defendant to reduce the verdict to 7*s*., if the Court considered that the cheque operated as

payment. A rule was accordingly obtained and argued.

Lord *Denman* said—"There really is no doubt upon the matter. The question at issue is, whether the plaintiffs have been paid to the amount of £8. 11*s*. The cheque of itself could not be any payment; it must either have been accepted at the time as money by the party taking it, or it must have been afterwards paid. Besides, this was a conditional cheque for the payment as a balance, and on that account could not be a payment, for the party was not, on that account, bound to receive it." *Hough* v. *May* (2 Harrison's Reports, 33).

4. *On the production of a cheque in custody of bankers.*

The question in dispute in a cause, being as to the partnership of the defendants, to show a joint payment by them,

Gurney, counsel for the plaintiff, called for the production of a cheque which a witness stated was in the hands of the defendants' bankers.

Scarlett, counsel for one of the defendants, objected that the plaintiff's counsel ought to call the banker's clerk to produce it.

Bayley, J.—"The bankers are your agents; you would have a right to go to the bankers and demand the cheque of them." *Burton* v. *Payne* (2 Carrington and Payne, 520).

In an action to recover the amount of a cheque, where the defendant does not deny giving the cheque, but pleads that it was given for a gambling transaction, the plaintiff is not bound to make it part of his case, nor to produce it for the purpose of the defendant giving it in evidence, unless he has received notice to produce it: *Reeves* v. *Gambell* (1 Har. and W. 567).

In *Rex* v. *Aldridge* (1 Nev. and M. 776), on the trial of an indictment for conspiracy to extort money under a charge of forging a cheque, it was held that the prosecutor was not bound to produce the cheque in question.

CHAPTER VIII.

ON CIVIL FRAUDS WITH CHEQUES DRAWN WITHOUT EFFECTS.

It appears clear that if a person buy goods of another for cash, and pay him by a cheque drawn without effects, that no property passes in the goods to the purchaser, and that the goods may be reclaimed by the person from whom they were obtained.

One of the earliest cases on this subject is that of *Earl Bristol* v. *Wilsmore* (1 Barnewall and Creswell, 514). There the plaintiff was a public officer for the execution of the king's writs, and in that capacity he had, by virtue of a writ, seized some sheep, alleged to be the property of a person named Miller. These sheep were taken by stratagem by Wilsmore and Page, the defendants, and the action was brought to recover them back again. On the part of the defendants, it was proved that Miller had obtained the sheep from Page under the following circumstances:—They

were offered to him for sale on Wednesday, the 12th May, 1821, by Lemon, the servant of Page, and Miller agreed to pay £78 in ready money for them. The bargain being made, the sheep were driven by Lemon to the house of Miller at Nayland, about nine miles from Colchester. Upon their arrival there, Miller prevailed upon Lemon to accept a cheque for £78 upon Mills & Co., bankers at Colchester, by assuring him that it was as good as money. Miller's account at the bankers had been overdrawn for some months before this transaction took place. Lemon then left the sheep in Miller's possession. Page, after keeping the cheque for two days, presented it at the bankers, and payment was refused. On the very day the sheep were obtained from Lemon, Elizabeth Carver, who was sister-in-law to Miller, went with him to the office of an attorney at Colchester, who was an entire stranger to them, and gave him instructions to prepare a warrant of attorney, which was accordingly done; and upon that, judgment was entered up and execution issued against Miller, under which the sheep were taken. Miller absconded, and was not afterwards heard of. Upon these facts it was contended, on the part of the defendant, that no property in the sheep was vested in Miller by the sale, he having obtained possession of them by fraud. A verdict having been found for the plaintiff, the Court ordered a new trial, and said:—

"Upon further consideration, we are all of

opinion that there ought to be a new trial. If Miller contracted for and obtained possession of the sheep in question, with a pre-conceived design of not paying for them, that would be such a fraud as would vitiate the sale, and, according to the cases which have been cited, would prevent the property from passing to him. Whether he obtained possession of the goods with such a pre-conceived design, is a question of fact which ought to be left to the jury, and for that purpose the case must go down to a second trial. At the former trial, the cases of *Noble* v. *Adams*, *Rex* v. *Jackson*, and *Read* v. *Hutchinson*, were not cited. If the property in the sheep had not passed to Miller, it is clear that the plaintiff was not entitled to the possession of them against the defendants. For the plaintiff had a right to seize, under the *fieri facias*, the property of Miller only. Unless the sheep, therefore, had become the property of Miller, the plaintiff had no right to take them, and still less to retain possession of them against the rightful owners."

The point was brought forward more prominently in the subsequent case of *Hawse* v. *Crowe* (Ryan and Moody, 414). There the plaintiffs sold some tallow to Ramsbottom, under an agreement, the principal stipulations of which were that the goods should be delivered in London, that the plaintiffs should give fourteen days' notice of delivery, and that Ramsbottom should pay for them on delivery. On the day of delivery, Ramsbottom

came to the counting-house of the plaintiffs, asked for and received the delivery orders for the tallow, *and gave a cheque for* £1,400, *drawn by himself on the cashier of the Bank of England, payable to the plaintiffs*. It is the custom of the Bank of England never to permit overdrawing; and, accordingly, Ramsbottom, having on that day only £2. 16*s*. 6*d*. in their hands, the cheque was dishonoured. The plaintiffs immediately gave notice to the warehouseman in whose custody the tallow was, not to deliver, but the tallow had already been transferred to one Forrester. Subsequently, however, the transactions with Forrester were rescinded, and the warehouseman delivered the tallow to Crowe, as assignee of Ramsbottom, under a commission of bankruptcy issued against Ramsbottom in the meantime. This action was then brought by the plaintiff against Crowe to recover the tallow in question. The Court said:—

"The right of Forrester to the tallow was determined before this action was brought, and Crowe claims only as assignee of Ramsbottom. The question therefore is, whether Ramsbottom, when he obtained the delivery orders *and gave the cheque*, intended to obtain possession of the tallow on the terms of the contract, namely, 'payment on delivery,' or not. If he had reasonable ground to expect that the cheque would be paid, the transaction was not fraudulent, and the property would pass to him; if he had not reasonable ground for so expecting, the transaction was fraudulent, and

the plaintiffs are entitled to recover." The jury returned a verdict for the plaintiffs.

This is a much stronger case against the validity of transactions connected with cheques drawn without effects, than the previous case of *The Earl of Bristol* v. *Wilsmore*, because here the drawer of the cheque had a small balance at the bankers when the cheque was drawn, whereas there the drawer's account had been closed for months. The fraud was therefore much less apparent, and yet the decision established that payment by such a cheque gave no title to the goods purchased.

In another case it appeared that the plaintiffs were brokers of the City of London, and in November, 1823, were employed by Tenbruggenhate & Co., London merchants, to purchase for them a large quantity of cotton. The plaintiffs, accordingly, on the 13th of that month, applied to Ryder, a merchant in the cotton trade, and agreed for the purchase of 110 bales of Surat cotton. The contract was regularly entered in their books thus :—

"London, 13th November, 1823.

"Bought by order and for account of Messrs. Tenbruggenhate and Payne, of Mr. A. Ryder, T. S., 1822, One hundred and ten bales Surat cotton, three piles, P. Swallow, at 6⅛*d.* per pound. Prompt one month, brokerage, 1½ per cent.

(Signed) "KILBY AND CARROL."

And the sale, *mutatis mutandis*, and brokerage

charged both parties. The plaintiffs were known by Ryder to be brokers; but the names of Tenbruggenhate & Co. were not disclosed at the time of the purchase. The custom of the trade is not to deliver the cotton until paid for, and the plaintiffs had been in the habit of dealing with Ryder, without disclosing the names of their principals. Bought and sold notes, signed Kilby and Carrol, were delivered to Ryder, and to Tenbruggenhate & Co., respectively, charging brokerage to both, but not naming any principals to either, the words "by order and on account of T. & Co. and R.," respectively, being omitted; in other respects, the notes were copies of the entries in the books. On the 28th of November, Tenbruggenhate applied to the plaintiffs for the cottons, who paid Ryder for the amount, and received the East India Company's warrants for the cottons, which were then in the company's warehouses. The plaintiffs on the next day, being Saturday, delivered the warrants to Tenbruggenhate & Co., *and received their cheque for* £1,027. 19*s.* 3*d.*, *the amount with the charges.* At the same time they delivered a bill of parcels, as follows:—

"London, 13th November, 1823.

"Messrs. Tenbruggenhate and Payne.

"Bought of Kilby & Carroll, One hundred and ten bales of Surat cotton, 3*d.*, per Swallow, lots, marks, &c., and charged brokerage £5. 3*s.* 8*d.*"

The names of Ryder and Tenbruggenhate & Co. were not communicated to each other as connected with the transaction. Tenbruggenhate took the warrants to the defendant, and deposited them as a security to cover his acceptances for two bills of £500 each, given to Tenbruggenhate & Co. In fact, Tenbruggenhate's only object in the whole transaction was to raise money and abscond; and on the evening of the 29th of November, being Saturday, he left this country for Paris, carrying with him the proceeds of large quantities of goods obtained from other persons, and for which payment had been made on that day, in cheques on Tenbruggenhate & Co.'s bankers. *These cheques, and amongst them that given to the plaintiffs, were dishonoured. Payne, who drew the cheques, was altogether unconcerned in the frauds of his partner, and had been persuaded by him that there was money in their banker's hands to the amount of* £5,000. Tenbruggenhate & Co. were declared bankrupts, and the solicitor to the commission pursued Tenbruggenhate to Paris, and recovered from him, with other property, the defendant's acceptances. These were afterwards given up to the defendant by the assignees, of whom the plaintiff Kilby was one. The defendant had sold the cottons before any demand was made by the plaintiffs, to secure himself from another advance, made to Tenbruggenhate before the deposit of the warrants. The action was resisted on the grounds that the plaintiffs had no property in

the cottons, they having bought and sold as brokers; and it was contended that the sale to Tenbruggenhate & Co., if valid, vested the property in the assignees; and if it was invalid through fraud, the property remained in Ryder.

Abbott, C.J., in summing up to the jury, said—"I am of opinion that upon this evidence the plaintiffs must be considered to have dealt with both parties as principals, however improper it may have been in them as sworn brokers. I think they are buyers of Ryder and sellers to Tenbruggenhate & Co. on their own account; and the only question I think fit to leave to you is, whether or not Tenbruggenhate obtained the warrants from the plaintiffs with a pre-conceived design to raise money upon them, and then abscond without ever paying the plaintiffs. If you are of that opinion, your verdict must be for the plaintiffs. In that case the partnership ought not to prevent the plaintiffs from recovering; for although the partner was himself deceived, and had no participation in the fraud, still no property could be vested in the partnership by such a transaction. If you think that Tenbruggenhate conceived the design of defrauding the plaintiffs, after he had obtained possession of the warrants, then your verdict must be for the defendant."

The jury returned a verdict for the plaintiff; and although an application was made for a new trial, yet it was refused: *Kilby* v. *Wilson* (Ryan and Moody, 178).

CHAPTER IX.

ON CRIMINAL FRAUDS BY MEANS OF CHEQUES DRAWN ON BANKERS WITH WHOM THE DRAWER KEEPS NO ACCOUNT.

We have seen the civil consequences which result from frauds by means of fictitious cheques. If false representations be made of the genuineness of the cheque, or false statements regarding the keeping an account with the banker, either of these may be sufficient to constitute a criminal offence.

In *Rex* v. *Jackson*, at Gloucester spring assizes, 1813 (3 Campbell, 370), on an indictment on Stat. 30 Geo. 2, c. 24, where it appeared that the prisoner had obtained property by giving a draft on his banker, *and pretending he had cash there to pay it*,

Bayley, J. (before whom the prisoner was tried), said—"That this point had been recently before the judges, and that they were all of opinion that it is an indictable offence fraudu-

lently to obtain goods, by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid.";

This case was followed in *R.* v. *Parker* (Moody's Crown Cases, vol. ii. p. 44), and there is now no doubt upon the subject.

It is not intended in this work to treat of other criminal offences in regard to cheques.

CHAPTER X.

1. *Cheques as tender.*
2. *As donatio mortis causa.*
3. *As a gift inter vivos.*
4. *As a will.*
5. *As an appointment.*
6. *Exchange of cheques.*
7. *Receiver's account.*

1. *Cheques as a tender.*

THERE are two cases on the subject of cheques as a tender. The first of them is known by the name of *Wilby* v. *Warren*, and occurred at the Court of King's Bench, Middlesex sittings after Michaelmas Term, in the 28th year of the reign of Geo. 3, and is reported in a note to "Tidd's Practice," ninth edition, p. 187. This report is very meagre, and contains no particulars of the facts or reasons; but, after stating that bank notes not objected to were ruled to be a good tender, it is added, per Buller, in *Wilby* v. *Warren*, that he "held the same doctrine applied to a draft on a banker." A case decided in 1840 by

Mr. Justice Coleridge, after argument, has confirmed *Wilby* v. *Warren*. The case referred to is that of *Jones* v. *Arthur*, reported in 8 Dowling's Practice Cases, and 4 Jurist, 859. There the defendant pleaded a tender, and on it issue was joined. The evidence to support the tender was a letter written by the defendant to the plaintiff containing a cheque for £5. It was stated in the letter that £5 was the right amount; and the writer required a receipt in acknowledgment. The plaintiff returned the cheque enclosed in a letter, in which he stated that he would not receive £5; and he requested to have a cheque for £5. 7*s*. 6*d*. There was no objection to the tender on the ground of its being in the form of a cheque; and it was proved at the trial only £5 was due. The jury, under the judge's direction, found that no tender had been made; and the defendant applied to the Court for a new trial. The application for the new trial was granted by Mr. Justice *Coleridge*, who said—"It appears to me that the plaintiff waived all objections to the nature of the tender in this case; he objected, not to the nature of the thing tendered, but to the amount."

The offer of a cheque on a banker at a town where the estate of a bankrupt has no banker, is not a proper tender by a creditor's assignee to the official assignee: *Ex parte Cunliffe* (1 De Gex, 408).

2. *Cheques as donatio mortis causa.*

A gift of a cheque was held not to be *donatio mortis causa;* and therefore it should be paid in the lifetime of the donor, or before the banker has notice of his death: see *Tate* v. *Hilbert* (2 Vesey, jun., 111).

In a recent case, *Reddell* v. *Dobree* (10 Simons, 244), the facts were as follows:—A. being in a declining state of health, delivered to B. a locked cash-box, containing money for herself, and entirely at her disposal after he was gone; but that he should want it every three months while he lived.

The box was twice delivered to A., by his desire, and he delivered it again to B.; and it was in her possession at his death. The key had a piece of bone attached to it, with B.'s name written on it; but A.'s son refused to deliver it to B. after A.'s death. B. broke open the box, which contained a cheque for £500, drawn by C. in favour of A., and enclosed in a cover indorsed with B.'s name.

The *Vice-Chancellor of England* held that this was not a valid *donatio mortis causa;* and that B. had no right to the cheque.

It will be observed, that in this case the giver did not part with the possession of the key of the box which contained the cheque.

See further: *Bouts* v. *Ellis* (22 L. J. (Ch.) 716); *Veal* v. *Veal* (36 L. T. 229); *Williams* v. *Davies* (33 L. J. (Prob. C.) 127).

3. *Cheques as a gift inter vivos.*

The drawer of a cheque gave it to the payee who presented it to the bankers, but they refused payment on account of some variation from the usual signature. On the next day, and the cheque being still uncashed, the drawer died. It was held that as the donor and donee had done all they could to make the gift complete, and that it did not take effect solely from the act of the banker, that it was an actual gift and must be paid out of the estate of the drawer: *Bromley* v. *Bruntom* (37 L. J. (Ch.) 902).

4. *Cheques as a will.*

In the case of *Bartholomew* v. *Henley* (3 Phillim. 317), it was held that a cheque could be proved as a will; but now, if intended so to operate, it must be signed in the presence of and attested by two witnesses: *Gladstone* v. *Tempest* (2 Curtis, 650).

5. *Cheques as an appointment.*

Where the donee of a power exerciseable by any instrument in writing has the fund lying at a banker's, a cheque drawn upon the banker would be a good appointment: *Brodrick* v. *Brown* (1 Kay & J. 328).

6. *Exchange of Cheques.*

The defendant gave a cheque to C , and received from him a counter cheque, on the understanding

that neither should be presented, but that the defendant's cheque should be returned in a few days. C., having overdrawn his account with his bankers, made a fraudulent agreement with the bank agent, to which the defendant was not privy, that the cheque in question should be paid into the bank, so as in appearance to reduce C.'s balance, but that it should be afterwards returned, and no action brought upon it. Before it was returned, the bankers (the present plaintiffs) took possession of it, and brought this action upon it against the defendant. *Held*, that a plea of want of consideration for the defendant's giving the cheque to C., and for C.'s transferring it to the plaintiff was disproved by the evidence that the defendant had received the counter cheque from C., and that the amount of the cheque had been allowed to C., in his account with the plaintiff: *Bosanquet* v. *Corser* (10 L. J. (N. S.) (Exch.) 275); Meeson and Welsby, 142; 9 Carrington and Payne, 664).

7. *Receiver's Accounts.*

In an action against the bankers by an agent to recover, as money had and received, or in an action for dishonouring the agent's cheques, while such money remained undrawn by the agent, the bankers cannot plead that the agent was acting on behalf of an undisclosed principal, who had claimed the money of the bankers: *Tassell* v. *Cooper* (14 L. T. (C.P.) 466).

But in Chancery, where it was known that the customer was only a receiver, the bankers were held liable for transferring money from the receiver's trust account to his private account. There the plaintiff, being owner of an estate, employed an agent and receiver, who paid into the defendant's bank the rents of the estate, to an account headed with the name of the estate, to distinguish it from his private account. The receiver's private account being overdrawn, he transferred the balance of the estate account to make up the deficiency due upon his private account.

Upon a bill filed by the plaintiff against the bankers, to refund this balance so transferred, it was held that, according to the principles of a Court of Equity, a person who deals with another knowing him to have in his hands, or under his control, money belonging to a third person, must not enter into a transaction with him, the effect of which is that a fraud is committed on the third person; and it appearing upon the evidence that the bankers were aware that the money was the produce of the rents of the plaintiff's estate, a decree was made against the bankers, for repayment of the amount: *Bodenham* v. *Hoskins* (21 L. J. (Ch.) 864).

CHAPTER XI.

LETTERS OF CREDIT.

A LETTER OF CREDIT is defined by McCulloch to be "a letter written by one merchant or correspondent to another, requesting him to credit the bearer with a certain sum of money." We do not think this definition strictly correct, at least in reference to letters of credit issued in places subject to the English stamp laws. It seems to us that the letter of credit, to be a legal document, ought to be payable to some particular person, and not to bearer; and that it ought to be sent direct from the banker who grants it to the banker who is to pay it, and the latter must satisfy himself of the identity of the person who applies to receive it. In this view of the matter, a letter of credit is simply a request from one banker to another, to pay a particular person a sum of money. It is not a draft, a bill of exchange, or a promissory note, and therefore it requires no stamp duty. It also

comes within the exemption from stamp duty (No. 3 at page 122). But if it should be drawn in the form of an order to pay the bearer, or to pay a particular person or order, and then delivered to the bearer or the payee, it would constitute a bill of exchange within the meaning of the Stamp Acts, and the Acts relating to banking. This view seems borne out to some extent by the case of the *Queen* v. *Kinnear*, for forging a bill of exchange. The bill was in this form :—

"Flintshire District Banking Company,
"Flint, 29th September, 1837.

"Twenty-one days after date pay (without acceptance) to the order of Mr. James Henderson £70 for value received, for the Company.

"J. WATKINS, Manager.

"To the London and Westminster Bank,
"Throgmorton-street, London."

Indorsed "J. HENDERSON."

It was objected that the direction not to accept, prevented the instrument from operating as a bill of exchange, and therefore that it was wrongly described.

Patteson, J., said—"This instrument certainly differs from all others that I have seen as bills of exchange, by reason of the words 'without acceptance.' I do not, however, consider that the insertion of those words alters the character of

the instrument, so as to prevent its being a bill of exchange. All that is necessary to constitute a bill is, that the party making the instrument should direct it to some other party, requiring that other party to pay the money therein mentioned to some third person or his order, or to the order of the party so making the instrument. The drawer may in each case prescribe the terms upon which the payment is to be made. Here he has chosen to prescribe that the drawee is to make the payment 'without acceptance;' the meaning of which I take to be, that the holder is not to be put to the trouble of presenting it to the drawee before it becomes due; but still, if he should choose to present it, there is nothing to prevent the drawer from accepting it; actual acceptance, of course, is not necessary to make the instrument a bill of exchange. Bills are daily noted and protested as bills for non-acceptance; they must, therefore, be bills before acceptance. Bills at sight are not, in fact, commonly accepted." *The Queen* v. *Kinnear* (2 Moody and Robinson, 117).

It may be remarked, in passing, that the words "without acceptance" were probably inserted in consequence of the cases of *The Bank of England* v. *Anderson* (3 Bingham's New Cases, 589); and *The Bank of England* v. *Booth* (6 Bingham's New Cases, 415); in which it was held that banks in London, consisting of more than six persons, could not accept bills of exchange without infringing

the privileges of the Bank of England. This has been altered by the 7 and 8 Vict., c. 32, s. 26.

In ordinary cases there are four parties concerned in letters of credit.

1. The person who pays the money to the banker, with specific instructions as to its application.

2. The banker who receives the money, and undertakes to write the letter to his correspondent, and that his correspondent shall act on it pursuant to the specific instructions of the party paying the money.

3. The banker to whom the letter is written, and who is probably under some contract with the banker who writes the letter, to honour it.

4. The person to whom the credit is to be given, who may also be the same person who pays the money in.

The position and rights of each of these parties appear to be as follows:—The person paying the money enters into a legal contract with the banker to whom he pays it, that it shall be applied in a particular way, and if that banker should not so apply it or procure it to be so applied, he will be responsible to this party in action for the breach of the contract: *Shillibeer* v. *Glyn* (2 Mee. & W. 143). And the banker, in such an action, cannot insist upon having the letter of credit returned to him: *Orr* v. *Union*, &c., (1 Macq. 513). The banker who is to pay the letter of credit is probably under an express or implied contract with the other banker to do so, and would be responsible

to him for breaking it, but not to either of the other parties. The person who is to receive the letter of credit has no right to proceed against the banker who ought to pay it, and can probably only look to the party remitting, unless it should be considered that he can sue the first banker for money had and received. The rule is, that "where an agent receives money to pay over to a third person, he continues to be accountable to his principal until he has entered into some binding engagement with that third person to hold the money to his use, and not until then will he be liable to the third person in an action for money had and received." *Baron* v. *Husband* (4 B. and A., 812): see also *Moore* v. *Bushell* (27 L. J. (Ex.) 3).

The duties of each party, arising from this view of their position, is for the party paying the money to give explicit instructions as to its application, which instructions the banker is to transmit to his correspondent, who is to obey them; and the party having a right to obtain the money must apply in a reasonable time to receive it, otherwise any loss arising from the failure of either of the bankers would probably fall upon him. In the event of these duties being neglected, each party will be liable to the one with whom he contracts, but not to any other party. The remedy of the banker paying the letter of credit for the amount thereof, would be against the banker who instructed him, and would be an action for money paid at his request, in which the letter of credit would prove

the request, and the receipt of the party to whom it was paid, would prove the payment. In practice, a cheque is drawn by the party entitled to receive the letter of credit, and is retained by the banker paying it, as a voucher, or an indorsement is made by the payee on the back of the letter of credit; and the paying banker is liable if he should pay a forgery: *Orr* v. *Union Bank of Scotland* (1 Macq. 513).

CHAPTER XII.

BANKERS' DRAFTS.

BANKERS' DRAFTS are ordinary bills of exchange drawn by one banker upon another in favour of, and delivered to, some third person. They are subject to some statutable restrictions, and the stamp duty on them can be paid by a composition. They are commonly engraved on a sheet of paper, so that a letter can be written with them. The following are the clauses of the statutes now in force relating to them. By 9 Geo. 4, c. 23, it is enacted, "That all persons carrying on the business of bankers, except within the city of London, or three miles thereof, having first duly obtained a license for that purpose, and given security by bond, may issue, on unstamped paper, promissory notes for any sum of money amounting to £5, payable to bearer on demand, or to order at any period not exceeding seven days after sight; or bills of exchange payable on demand, or at any period not exceeding seven days after sight, or twenty-one days after date; provided such

bills be drawn upon any banker in London, Westminster, or the borough of Southwark, or bills drawn upon themselves at any place where they are licensed to issue such bills, payable at any other place where they shall also be duly licensed." Banks ceasing to carry on business, and banks established since the 6th of May, 1844, cannot issue bills or notes payable to bearer on demand: 7 & 8 Vict., c. 32, ss. 10, 11, & 12.

By 3 and 4 Wm. 4, c. 83, s. 2, it is enacted, "That it shall be lawful for any body politic or corporate whatsoever, erected or to be erected, and for any other persons united or to be united in covenants or partnership, exceeding the number of six persons carrying on business as bankers, to make any bill of exchange or promissory note of such corporation or co-partnership payable in London, by any agent of such corporation or co-partnership in London; or to draw any bill of exchange or promissory note upon any such agent in London, payable on demand or otherwise in London, and for any less amount than £50."

By 7 and 8 Vict., c. 32, s. 26, it is enacted, "That it shall be lawful for any society or company, or any persons in partnership, though exceeding six in number, carrying on the business of banking in London, or within sixty-five miles thereof, to draw, accept, or endorse bills of exchange, not being payable to the bearer on demand."

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